Office Supreme Court U. S.
FILED.
APR 13 1895
JAMES H. McKENNEY,
CLERK

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1894.

No. 299. 51

RUTLAND RAILROAD CO.,

Plaintiff in Error,

v.

CENTRAL VERMONT RD. CO. ET AL.,

Defendants in Error.

BRIEF FOR PLAINTIFF.

C. A. PROUTY,

GEO. F. EDMUNDS,

Of Counsel.

PRESS OF THE ARGUS AND PATRIOT CO., MONTPELIER, VERMONT.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1894.

No. 299.

RUTLAND RAILROAD CO.,
Plaintiff in Error,
v.
CENTRAL VERMONT RD. CO. et. al.,
Defendants in Error.

BRIEF FOR PLAINTIFF.

STATEMENT OF THE CASE.

In 1870, while the Vermont Central and Vermont and Canada railroads were being operated by trustees and managers, as receivers under the order of the court of chancery, said trustees and managers in that capacity entered into a contract with the Rutland Railroad Company, the plaintiff, for a lease of the Rutland and Addison railroads for the term of twenty years from January 1, 1871.

By virtue of that lease the trustees and managers went into the possession of said Rutland and Addison railroads, and continued in such possession until June 21, 1873. Upon that date the defendant Central Vermont Railroad Company was, by order of the court of chancery, substituted as re-

ceiver and manager for the trustees and managers aforesaid. Under this order the Central Vermont succeeded to the rights and liabilities of the trustees and managers with respect to the aforesaid lease, and went into possession of the railroads of the plaintiff thereunder, and so continued in possession until February 25, 1876. Upon that date disputes as to the payment of rent having arisen, an amendment to the original contract, known as the contract of modification, was executed between the plaintiff and the Central Vermont company as receiver and manager. This contract of modification was duly approved by the court, and under it the Central Vermont continued to operate said railroads down to the commencement of this suit.

On or about June 30, 1884, the Central Vermont company, under an order of the court of chancery, turned over to the Consolidated Railroad Company of Vermont, the other defendant in this suit, all the property held by it as receiver and manager, including the lease of the Rutland and Addison railroads aforesaid, and on the same day the Consolidated company leased to the Central Vermont the property so turned over to it, and assigned to said Central Vermont company its interest in the aforesaid lease of the Rutland and Addison roads. It was a condition of the order of January 17, 1884, that the Consolidated company should assume and carry out whatever obligations rested upon the receivership to the plaintiff with respect to said lease, and it was ordered that the original cause be continued upon the docket, and that the properties remain subject to the summary order of the court for the protection of the plaintiff in the premises. The Consolidated company, pre-

viously to the transfer of June 30, covenanted that it would comply with this condition in the order, and the assignment by it to the Central Vermont company of the aforesaid lease was made subject thereto.

This suit was begun by petition in the original cause, and in it the plaintiff claims that the rent provided for in the contract of modification has not been paid, and asks for an order upon the Consolidated company and the Central Vermont company for its payment. No question was made in the court below, and of course no question can be made here as to the propriety of this form of proceeding nor as to the liability of these defendants for the payment of this rent, provided it has not been paid: that is, the Central Vermont company stands related to the questions raised upon this writ of error exactly as it would if the original contract and the contract of modification had been made with it in the first instance.

At the time of the execution of the original contract the property of railroad companies in Vermont was not taxed. In 1876 it was provided that the road bed of railroad companies should be listed and taxed in the various towns like other real estate. In a suit between the plaintiff and the defendant Central Vermont company, decided before 1882, it was held by the supreme court of Vermont that under the original contract and the contract of modification these taxes so assessed upon the real estate of the Rutland and Addison railroads must be paid by the plaintiff.

In 1882 the legislature of Vermont first enacted what is known as the corporation tax law, by which railroad companies were exempted from the payment of all other taxes

upon property used for railroad purposes, and were required to pay to the state a tax of a certain per cent upon their gross receipts. The entire act is printed at the end of this brief. The four sections material to this discussion are ss. 11, 12, 13 and 14, which read as follows:

Sec. 11. "Every corporation, person or persons, owning or operating a railroad in this state, whether as owner, lessee, receiver, trustee or otherwise, shall pay a tax to the state on the entire gross earnings of such railroad, if such railroad is situated wholly within the state. If such railroad is situated partly within and partly without the state, the tax shall be upon such proportion of the entire gross earnings of such railroad as the mileage of trains run in this state bears to the mileage of all the trains run on the entire main line of the road.

Sec. 12. "The tax upon such earnings shall be rated according to the earnings per mile of road in this state, and is hereby assessed at the rate of two per cent on the first two thousand dollars a mile of total earnings if less than that sum; at the rate of three per cent on the first thousand or part thereof above two thousand dollars a mile: at the rate of four per cent on the first thousand or part thereof above three thousand dollars a mile: and when the earnings exceed four thousand dollars a mile, at the rate of five per cent on all earnings above that sum.

Sec. 13. "Such tax shall be payable one-half semi-annually in the months of February and August, and shall be based upon the gross earnings during the six months terminating with the last day of December or June next preceding.

Sec. 14. "When a railroad is operated in this state by a corporation, person or persons, by virtue of a lease or other contract, the aforesaid tax shall be paid by the lessee of such railroad or holder of such contract as the case may be; and the said tax shall be charged against and deducted from any payments due or to become due the lessor of such railroad, or person, persons or corporation granting such contract, as

the case may be, on account of such lease or contract, unless in the provisions of such lease or contract it is stipulated otherwise."

By the terms of the contract of modification it was provided that the Central Vermont company should pay by way of rent to the Rutland company the sum of $258,000 annually, in monthly instalments, and this rent might be increased if the gross receipts of the system operated by the Central Vermont company, and of which the Rutland and Addison railroads became a part, exceeded a certain amount. Record, pp. 10, 11. This rental continued to be regularly paid down to the time when the act above referred to went into effect.

That act provides that the commissioner of taxes shall send to the corporation required to make payment of the tax certain blanks, upon which returns containing the information necessary for the assessment of the tax are to be made by the corporation. At the proper time the commissioner of taxes sent such blanks to the Central Vermont company, and that company made out the returns for the various railroads operated by it, including the Rutland and Addison railroads, computed the tax upon the gross receipts of the Rutland and Addison railroads, and paid that tax to the state treasurer. No blanks were ever sent to the Rutland company, no returns were ever made by that company, and no demand was ever made upon that company for the payment of the first or any subsequent tax.

After the payment of this tax by the Central Vermont company, the treasurer of that company wrote to the treasurer of the Rutland company, informing him that the Cen-

tral Vermont company had paid the tax as required by the act, and asking him what arrangement should be made for its recoupment from the rent due under the lease to the Rutland company. Thereupon, the treasurer of the Rutland company replied that that company insisted that the tax was invalid; that the Rutland Railroad Company was entitled to the full amount provided for by the contract of lease, and accordingly demanded payment of the same in full without deduction on account of the tax. No further communication was had between the companies with reference to this matter. Record No. 299, pp. 13, 14.

The Central Vermont Company continued to make the returns and pay the taxes according to the act, and deducted an amount from the rental due the Rutland Company which it claimed was equivalent to the amount so paid. Certain questions arose in the court below as to the method in which these returns had been made by the Central Vermont Company, and as to whether the amounts which that company had retained were not in excess of the taxes which, according to the terms of the act, it ought to have paid. Those questions are raised by the report of the master and were disposed of by the decree in the court below. They are not before this court; the only question here being, could the Central Vermont Company deduct the taxes levied by that act from the rental due under the contract of lease?

ASSIGNMENT OF ERRORS.

In the state court the plaintiff insisted that it could not constitutionally do this, for two reasons:

1st. Assuming the tax to be a valid tax, which could be laid against the plaintiff in a proper manner, nevertheless the 14th section is not a legitimate method for the collection of that tax. That section provides that in every case where a railroad is held under lease, the returns shall be made and the tax paid by the lessor at the expense of the lessee. Now when the State of Vermont, without any process of law whatever, simply directed a debtor to pay to the State by way of taxes a certain portion of the debt which he had promised to pay his creditor, the plaintiff insisted that such a law violated the obligation of the contract, and also that it violated the obligation of this contract in declaring that the lessee should pay the rent.

Upon this point the Supreme Court of Vermont held against the claim of the plaintiff. The language of the court is as follows:

"We hold, therefore, that section 14 of our corporation tax law is not unconstitutional in respect to the method prescribed for the collection of taxes assessed upon the earnings of railroads operated by lessees." Record, p. 37.

The second paragraph of the mandate sent down from that court reads:

"That section 14 of said act, providing that taxes assessed under said act upon the earnings of railroads operated by

lessees thereof shall be paid by such lessees and charged against and deducted from the rents due to the lessor of such railroad, is constitutional and valid." Record p. 30.

2d. In the second place the plaintiff insisted that the tax itself was invalid. The report shows that a large portion of the earnings of the plaintiff upon which the tax was computed and paid by the defendant was derived from interstate commerce, and the contention of the plaintiff was that this tax was void as a regulation of commerce between the states.

Upon this point the Supreme Court of Vermont ruled that the tax was unconstitutional for the reason claimed. The first paragraph of the mandate reads:

"The act of the Legislature of Vermont entitled 'An act to provide a revenue for the payment of state expenses,' approved Nov. 28, 1882, so far as it imposes a tax upon the gross earnings of railroads derived from interstate transportation of persons or property is unconstitutional and void, as being in conflict with that clause of the Federal Constitution which confers upon Congress the exclusive power to regulate commerce among the states." Record p. 29.

Inasmuch, however, as the decisions of this court from 1882 down to May 27, 1887, when the case Philadelphia & Southern Mail Steamship Company v. Pennsylvania, 122 U. S. 326, was promulgated, had apparently upheld the constitutionality of similar legislation, the State court further held that the act was to be treated as valid, and that the defendant should, therefore, be allowed for payments made under it as though it had been in fact valid. The language of the court upon this point is as follows:

"But it by no means follows because the defendant has paid to the State taxes under a law afterwards held to be

void by withholding the amount thereof from the rent that the Rutland Co. can now claim the balance of its rent for this reason.

"Down to May 27, 1887, the date on which the decision of the court, in 122 U. S., above cited, was promulgated, the doctrine of the cases decided by the Supreme Court, upheld the constitutionality of the taxation in question. State tax on Railway Tax Receipts, 15 Wall., 284; Minot v. P., W. & B. R. R. Co., 18 Wall., 206, and the numerous cases cited in the defendant's brief. Accordingly all payments theretofore made were, so far as the validity of the tax was involved, payments made in obedience to law. It is an elementary principle that a contract valid under an existing law and payments made upon it will not be validated by subsequent legislation or subsequent judicial interpretation of the law. The decision of a court of competent jurisdiction upholding the validity of an existing law validates everything done under it so long as such adjudication remains unchanged. Gelpecke v. City of Dubuque, 1 Wall., 175; Havermeyer v. Iowa City, 3 Wall. 294; Cass v. Johnston, 95 U. S. 360; Douglass v. Pike Co., 101 U. S. 679; 16 How. 432; 19 Wall. 677. * * The Supreme Court of the United States is the supreme arbiter when a Federal question is involved. Down to 1887 that court ruled the Federal question now under consideration in a way that upheld the legislation in question. Its decisions then promulgated were the supreme law of the land, absolutely binding upon both parties to this cause. Hence all payment of taxes made under our law, which down to that time must be treated as valid for present purposes, were made in strict conformity of law."

"The subsequent change in the decision of the U. S. Supreme Court is only operative prospectively, and all acts done in obedience to the former decisions are valid and cannot be disturbed." Record pp. 37, 38.

It would seem, therefore, that three propositions are drawn in question under the record.

1. Assuming the tax to be constitutional, did the statute of Vermont, which directed the defendant to retain and pay

to the state as taxes a portion of the rent, impair the obligation of the contract? If it did, clearly the decision of the state court should be reversed, for that question was distinctly made below, was decided adversely to the plaintiff and in favor of the validity of the act, and the judgment could not have been rendered without so deciding.

2. If this statute was a legitimate method for the laying and collection of this tax as against the plaintiff, was the tax itself unconstitutional as a regulation of interstate commerce?

3. If unconstitutional upon that ground, should it be treated as valid between these parties during the time covered by this controversy, as held by the state court?

ARGUMENT.

I.

Does the 14th section of the Vermont Act impair the obligation of the contract between these parties?

By the terms of that contract the defendant had promised to pay the plaintiff $258,000 annually. This section, as applied to this case, permits the discharge of that obligation by the payment of $240,000 annually. The Central Vermont Company promised the Rutland Company to pay it $258,000 per annum. The Vermont Legislature enacts that it need pay only $240,000 per annum in full satisfaction of that promise.

It is urged upon the part of the defendant that since the balance of the contract rental is paid to the State by way of tax, this is merely a method which the State may adopt for the collection of that tax, and that it is a matter of indifference to the plaintiff whether it pays that tax in the first instance, or indirectly by way of a deduction from the amount of its rent.

The plaintiff insists that this is not the law. Assuming for the purpose of the argument that the State might impose this tax upon the Rutland Company: that it might collect it from that company by due process of law, still it cannot permit nor direct the Central Vermont Company to discharge its existing obligation by paying a portion of that indebtedness to the State as a tax. The plaintiff has contracted to pay the defendant a certain sum at a certain specified time, and any law which excuses the payment of that sum at the specified times, impairs the obligation of the contract.

The case of Murray v. Charleston, 96 U. S., 432, is we submit, exactly in point. The plaintiff held certain evidences of indebtedness against the City of Charleston. By the terms of that indebtedness the city agreed to pay the holders interested at the rate of six per cent annually. By a city ordinance passed in accordance with an act of the legislature, the city laid a tax of two per centum on this indebtedness and directed its treasurer to retain that amount from the interest due. It was so retained and the plaintiff brought suit. The plaintiff was a non-resident, but the court expressly declined to consider the force of this fact. It was assumed in the decision that the ordinance was valid and that the city might thereby tax an indebtedness to itself; but

it was held that the tax could not be collected in this manner. The defendant had contracted to pay the plaintiff six dollars annually on every hundred, and it could not discharge that contract by the payment of four. The court said:

"A change of the expressed stipulations of a contract, or a relief of a debtor from strict and literal compliance with its requirements, can no more be effected by an exertion of the taxing power than it can be by the exertion of any other power of the State Legislature. The constitutional provision against impairing contract obligations is a limitation upon the taxing power, as well as upon all legislation, whatever form it may assume. Indeed, attempted state taxation is the mode most frequently adopted to affect contracts contrary to the constitutional inhibition. It most frequently calls for the exercise of our supervisory power. It may, then, safely be affirmed that no state, by virtue of its taxing power, can say to a debtor you need not pay to your creditor all of what you have promised him. You may satisfy your duty to him by retaining a part for yourself, or for some municipality, or for the State Treasury."

The learned judge who delivered the opinion of the court below sought to escape the effect of this decision by observing that the plaintiff was a non-resident, and that therefore, the city of Charleston had no right to tax him at all. An examination of the opinion will show that, however the court might have decided that question, it expressly refused to consider it. This is the language of the court:

"We do not care now to enter upon the consideration of the question whether a State can tax a debt due by one of its citizens or municipalities to a non-resident creditor, or whether it has any jurisdiction over such a creditor, or over the credit he owns. Such a discussion is not necessary, and it may be doubtful whether the question is presented to us by this record."

It also appears from a reference to this same case in Hartman v. Greeno, 102 U. S., 672, that the court then understood the decision to have proceeded upon the ground that the ordinance of the city of Charleston impaired the obligation of the contract.

The Vermont court also sought to find an analogy between this and the case of a non-resident stockholder in which the corporation is directed to pay the tax, and given a lien upon the stock of such stockholder and the dividends due him. An examination of the case in which the right to so tax non-resident stockholders was upheld, St. Albans v. National Car Co., 57 Vt. 68, will show that there is no force in this comparison. It was in that case held that a non-resident stockholder might be taxed and that the corporation might be required to pay the tax on account of the stockholder, but the decision on both these points was put upon exactly the same ground: viz, that a stockholder in a domestic corporation took his stock subject to the charter of the corporation and whatever limitations the statute law of the state might engraft upon that charter; that the statute law and the charter might provide that stock for the purposes of taxation should have its situs in the state in which the corporation was created, and that the tax when assessed should be paid by the corporation; and that a stockholder taking his stock subject to that limitation could not object to its enforcement by the state. And it is believed that whenever the right to so tax non-resident stockholders has been upheld, it has been upon this ground. There is no analogy between dividends due upon stock and a payment due under

a contract. The corporation has never contracted to pay its stockholders dividends.

The court further likens this to the case of a collector of the tax by trustee process. But in that case a suit is begun, notice is given to the defendant, judgment is obtained, and the money is paid over under that judgment. If the opinion of the learned judge is correct, the tax-collector has only to find out some creditor of the tax-payer, give him a receipt for the amount of the tax, and direct him to charge it over to the tax-payer in the settlement of his indebtedness.

It is undoubtedly true that this property, like all other property, was subject to the right of taxation inherent in the State. The State of Vermont might tax the property, or the franchise, or the income of the Rutland Company, in a proper way, and might provide for the collection of that tax by any proper method, but it has no right to direct the defendant to pay over to the State a certain amount of its indebtedness, in the way of taxation. It might as well direct every debtor in the State to make a return of the amount of his indebtedness, and the rate of interest upon the same, and to pay one-half of that interest to the State and the other half to the creditor.

Again, the 14th section, as interpreted by the Supreme Court of Vermont, impairs the obligation of the contract for the reason that it compels the Rutland company to pay that tax which under the terms of the lease and without that section would be chargeable upon the Central Vermont Company.

The tax under the Act of 1876 was a tax on the real es-

tate of the plaintiff, and so it was held that the plaintiff was bound to pay it. The Act of 1882, on the contrary, was solely and *eo nomine* a tax on gross receipts without reserve or discrimination in respect of the source from whence they were derived. The plaintiff in its character as landlord was not bound to bear such a tax, even if the tax itself were valid. It is like the case of any other lease of real estate to be used for business purposes, which purposes might be subject to excise, such as renting a hotel which could not be carried on without a license, or renting a distillery where heavy taxes are imposed upon the operations of the lessee.

This was a tax purely upon the operations of the lessee and one with which the plaintiff had nothing to do. This, although a State question under the lease merely and leaving out of view entirely the act of the legislature which directed that the lessee should take the taxes out of the rent unless it was stipulated to the contrary, becomes in this case a national question when the act imposing the tax undertakes to decide that the lessor shall bear it, no matter what the true interpretation of the lease itself may be, unless the lease itself contain a clause requiring the lessee to pay; and thus making the legislative edict the ground, relieving the defendant from the obligation to pay rent according to the terms of the lease. This court, therefore, must decide whether the contract of lease itself bound the plaintiff to bear the burden imposed by the act, passed after the lease was executed on the operations of the defendant. Even if the act were held to be a tax on franchises it was the exercise of that franchise that was taxed. The legislator did not, by the lease, undertake to guarantee against laws re-

quiring the lessee to pay taxes upon its gross receipts; and the act itself could not lawfully shift the burden from the lessee to the lessor, unless the lease itself imported such an obligation, nor could such an act furnish excuse for withholding rent due.

The act in this respect was a legislative decision that, in the absence of a "stipulation" that the lessee should pay the tax on the business operations it carried on under the lease, the lessor should have it taken from its rent.

The legislature of Vermont could not write into this contract a provision which the parties themselves had not put there.

II.

Was the Vermont statute invalid?

The case shows that a large proportion of the receipts of the plaintiff upon which the tax was computed and paid were derived from interstate and foreign commerce, and it is insisted that under the recent decisions of this court such a tax is a tax upon transportation itself and void as a regulation of commerce.

Welton v. Missouri, 91 U. S. 275.
Robbins v. Shelby Co., 120 U. S. 493.
Wabash, St. Louis & Pacific Rd. Co. v. Illinois, 118 U. S. 557.
Fargo v. Stevens, 121 U. S. 230, 243.
Philadelphia &c. S. S. Co. v. Pennsylvania, 122 U. S. 326, 342, 343.

In State Freight Tax, 15 Wall. 232, decided in 1872, it was determined that a State tax of so much per ton on interstate transportation was void as a regulation of commerce. At the same term and in the same connection it was decided in State Tax on Railway Gross Receipts, 15 Wall. 232, that a State tax on the gross receipts of a railway company engaged in interstate transportation, was valid. The court put this last decision upon two grounds; first, that a tax upon the gross receipts of a railway company was not a tax upon the transportation from which those receipts were derived, but upon the income of the company which might be taxed like other property; second, that the State, having created the corporation, might prescribe the conditions upon which this franchise should be enjoyed. This case has never been in terms overruled, but the principle asserted in the first ground of the decision, that a tax upon the receipts from transportation is not a tax upon the transportation itself, was never followed, and has finally been expressly denied, and the contrary adjudicated.

In Welton v. Missouri, 91 U. S. 275, the law drawn in question was one exacting the payment of a license from all peddlers who were engaged in the state of Missouri vending articles, not the product or manufacture of that state. The plaintiff was fined for selling a sewing machine not manufactured in the state. This court held that the law was unconstitutional as a regulation of commerce, for the reason that the tax upon the dealer "must be regarded as a tax upon the goods themselves."

The same doctrine was re-affirmed as applied to the same subject matter in Robbins v. Shelby Co., 120 U. S. 493, in

which it was held that a law of Tennessee requiring a drummer who was engaged in selling the goods of a house in Ohio, to pay a license, was void as a regulation of commerce, for the reason that to tax the person selling the goods of another state in Tennessee was to interfere with the sale of the goods themselves.

The right of a state to tax gross receipts accruing from interstate transportation came directly before the court in Fargo v. Stevens, 121 U. S. 230. The Merchant's Dispatch Transportation Company was a New York corporation having its principal office in the city of New York. It was engaged in the transportation of freight in different portions of the United States, among other places in the state of Michigan. Its entire business in Michigan was interstate. By the laws of that state the gross receipts derived from such transportation were taxed. It was held that this law was invalid for the reason that tax receipts derived from interstate transportation was a tax upon the transportation itself, and void as a regulation of commerce. The head notes were written by the judge who delivered the opinion of the court, and the first of these reads:

"A State statute which levies a tax upon the gross receipts of railroads for the carriage of freight and passengers into, out of, or through a State, is a tax upon commerce among the states, and, therefore, void."

The precise question under discussion was before the court in Philadelphia, etc. S. S. Co. v. Pennsylvania, 122 U. S. 326. The statute of Pennsylvania enacted

"That every railroad company, canal company, etc., now or hereafter incorporated by or under any law of this Commonwealth, or now or hereafter incorporated by any other

State and doing business in this Commonwealth, and owning, operating, or leasing to or from another corporation or company, any railroad, canal, etc., for the purpose of freight or passengers, or in any way engaged in the transportation of freight or passengers shall pay to the State treasurer for the use of the Commonwealth, a tax of eight-tenths of one per centum upon the gross receipts of said company for tolls and transportations."

The plaintiff in error was a Pennsylvania corporation engaged in transporting freight and passengers from points in that State to other States and foreign countries. It was held that a tax upon its gross receipts accruing from this source was invalid as a regulation of commerce. The court in its opinion affirmed the doctrine of the State freight tax case, that a tax upon interstate transportation is a regulation of commerce, expressly overruled the doctrine of State tax on Railway Gross Receipts case, that a tax on the receipts from transportation is not a tax on the transportation itself, and decided the contrary.

This decision was a unanimous one, and the doctrines upon which it is founded have been since then repeatedly reaffirmed by this court.

Leloup v. Mobile, 127 U. S., 668.
Leisy v. Hardin, 135 U. S., 100.
Lyng v. Michigan, 135 U. S., 161.
McCall v. California, 136 U. S., 104.

The case of Maine v. Grand Trunk Railway Company, 142 U. S. 217, in no respect varies or qualifies that decision. The statute of Maine imposes upon every corporation, person or association, operating a railroad in that

State "an annual excise tax for the privilege of exercising its franchises in the State," and provided that the amount of the tax should be ascertained by taking a certain per cent of the gross receipts upon the railroad within that State. This tax was upheld, but it was expressly upon the ground that it was an excise tax and not upon gross receipts; that the reference to gross receipts was only for the purpose of ascertaining the value of the franchise for the use of which the tax was imposed. It is explicitly said by the court that the decision did not conflict with the case of Philadelphia, &c., S. S. Co. v. Pensylvania.

"That was a case of a tax in terms upon the gross receipts of a steamship company, incorporated under the laws of the state, derived from the transportation of persons and property between different states and to and from different countries. Such tax was held, without any dissent, to be a regulation of interstate and foreign commerce, and, therefore, invalid. We do not question the correctness of that decision, nor do the views we hold in this case in any way qualify or impair them."

If, then, the Vermont statute imposes a tax upon the gross receipts of railway companies, it must be invalid. Clearly it does. Such is the explicit language of the act itself.

Section 11 reads:

"Every corporation, person, or persons owning or operating a railroad in this State, whether as owner, lessee, receiver, trustee or otherwise, shall pay a tax to the State on the entire gross earnings of such railroad."

Section 12 reads:

"The tax upon such earnings shall be rated according to the earnings per mile of road in this state, and is hereby assessed at the rate of two per cent on the first $2,000 per mile, or total earnings if less than that sum, etc."

The Pensylvania act did not more explicitly tax gross receipts than does the Vermont act, indeed the two are almost identical in terms.

Such, moreover, was the decision of the Supreme Court of Vermont. That court held that the act imposed a tax upon the gross receipts of the plaintiff, and was for that reason invalid as a regulation of commerce. This is the language of the court:

"We hold, therefore, that our corporation tax law, so far as it seeks to tax the earnings derived from interstate commerce, is unconstitutional, as it interferes with that commerce, the regulation of which is within the exclusive control of Congress."

In another part of the opinion the court says:

"The tax is not a franchise tax, as it is levied indiscriminately upon the earnings of all railroads operated in the state, and irrespective of the source of their chartered power. It is in terms a tax upon the earnings of railways rated by the mile."

Upon the construction of this statute the decision of the Vermont court against its validity is controlling.

Murray v. Gibson, 15 How. 421, 423.
Pease v. Peck, 18 How. 595.
Leffingwell v. Warren, 67 U. S. 599.

III.

The Supreme Court of Vermont decided that the act was unconstitutional, but that the defendant was, nevertheless, protected by it in making these payments to the state. Can this be so?

The Central Vermont Company has promised to pay to the plaintiff a given sum of money. It concedes that it has never paid that sum. It sets up as an excuse for not paying it, this act of the state of Vermont. Now if the law under which these payments were made be invalid, it would appear to be a self evident proposition that the excuse which the Central Vermont Company urges must fail and that the Rutland Company is entitled to the payment of its rent in full.

It ought to be a judicial axiom that no man can be deprived of his property by force of an unconstitutional law, against his will.

In Marbury v. Madison, 1 Cranch 177, Chief Justice Marshall said:

"If an act of the legislature repugnant to the constition is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory, and would seem, at first view, an absurdity too gross to be insisted upon."

One of the earliest cases is that of Osborn et al. v. Bank, 9 Wheaton 830. This was an action against the treasurer of the State of Ohio for having broken open the vaults of the bank and abstracted therefrom the sum of one hundred thousand dollars in specie under a law of the State of Ohio assessing these taxes against the bank and commanding him as treasurer to levy it in this manner. The law had not been declared unconstitutional when the suit was brought. Chief Justice Marshall on page 839 says:

"The appellants expressly waive the extravagant proposition that a void act can afford protection to the person who ex-

ecutes it." Again on page 868, "The counsel for the appellant are too intelligent and have too much self-respect to pretend that a void act can afford protection to the officer who executes it. They expressly admit that it cannot."

"Whatever may be the case in other countries, yet in this there can be no doubt that every act of the legislature repugnant to the constitution is absolutely void."

Patterson, J., in Van Horne v. Dorrence, 2 Dall., 308.

"No question of law is better settled, and this is admitted by counsel for the appellants in their brief, than that ministerial officers and other persons are liable for acts done under an act of the legislature which is unconstitutional and void. All persons are presumed to know the law and if they act under an unconstitutional enactment of the legislature they do so at their peril and must take the consequences."

Summer et al. v. Beeber, 50 Ind. 341.

"There is no axiom of the law better settled than this: A void law can afford no justification to any one who comes under it; and he who attempts to collect the tax under the illegal law will be a trespasser. He will proceed, it is true under color of law, an act standing upon the statute book, but a void act. If he open the vaults by force and abstract a portion of its specie under pretence of collecting the tax, he, though treasurer of the county, will stand without justification or excuse. He has no more right to do this than any other person who can set up under pretence of authority."

Woolsey v. Dodge, 6 McLean, 146.

"It may not be a wise thing as a rule for subordinate ministerial or executive officers to undertake to pass upon the constitutionality of legislation prescribing their duties and to disregard it if in their judgment it is invalid. This may be a hazardous proceeding to themselves and productive of a great inconvenience to the public; but still the determination of the judicial tribunals can alone settle the legality of their action. An unconstitutional act is not a law; it binds no one and protects no one."

Little Rock &c. Rd. Co. v. Worthen, 120 U. S., 97.

Cooley, Torts, page 224, (*188): "When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never at any time been possessed of any legal force."

This question has been most often raised in suits involving the validity of taxes. These suits have generally been against the collector who had distrained the property of the plaintiff and paid over the tax thus collected. When the collection was made and when the suit was brought the law imposing the tax had not been declared invalid. So far as we can learn it has never been held, and never been suggested, that an unconstitutional law could afford a collector protection. The question is upon the constitutionality of the act. If it is valid then the suit fails and the officer justifies. If it is invalid, then the justification fails and the officer is liable. So are all the cases beginning with Osborne v. Bank.

Collector v. Day, 11 Wall. 13.
Virginia Coupon Cases, 114 U. S. 297.
Dobbins v. The Commissioners of Erie County, 16 Pet. 435.
Hayes v. The Pacific Mail Steamship Co., 17 How. 597.
The New York Indians, 5 Wall. 761.
Cox v. The Collector, 12 Wall. 204.
Low v. Austin, 13 Wall. 29.
Morgan v. Parham, 16 Wall. 471.
Keith v. Clark, 97 U. S. 454.
Supervisors v. Stanley, 105 U. S. 305.

Upon general principle this must be so. What is an unconstitutional law? It is a law in defiance of the constitution. And what is the constitution? It is the solemn enactment of the people from which the legislature derives its authority and by which that authority is limited. But for the constitution the legislature has no authority. When it passes an act in defiance of the constitution, that act is and must be absolutely void, for the legislature has no power to enact it. It is no man's duty to obey it; it is no man's right to obey it, when by obeying he infringes the rights of another. As this court said in Little Rock, &c. Rd. Co. v. Worthen, *supra*, "An unconstitutional act is not a law; it binds no one and protects no one."

In this case the plaintiff has not consented to be deprived of its property. The first payment of the tax under this law was in August, 1883. September 12th of that year the treasurer of the defendant addressed to the plaintiff a letter notifying it of the payment and asking how that payment should be adjusted. September 19th the petitioner notified the defendant by letter, which was duly received, that it claimed the tax to be invalid, and that it should insist upon the amount of its rent in full without any deduction on account of the tax, and that it should litigate the question if the defendant persisted in withholding it. Record, pp. 13, 14. In February, 1886, the plaintiff began this suit for the recovery of the rent so retained, and has prosecuted it with all possible expedition since. It cannot be claimed, therefore, nor does the defendant claim that in paying this tax it supposed it did so with the consent of the petitioner.

The question is not, did the plaintiff protest? It was under no obligation to protest. In a case of this sort a protest could only be necessary when the failure to make one might be construed into a consent.

The Supreme Court of the State of Vermont concedes that as a general proposition, this is correct, but seeks to engraft upon the present case a most important and somewhat novel exception. It says, in substance, that the decision of this court upon the question involved is supreme; that in 1872 this court decided that legislation like the Vermont act was valid; that in 1887 it reversed that decision and held that such legislation was not valid; that the Vermont act of 1882 is to be treated as valid until the promulgation of the decision of this court, in 1887, and that, therefore, it protects the defendant in the payment of these taxes in precisely the same way that it would have protected it had the act been in fact constitutional.

The premises of the Supreme Court of Vermont are by no means admitted.

But assuming that the premises of the Supreme Court of Vermont are correct, is the conclusion right? That court proceeds upon the strength of various cases in this court beginning with Gelpecke v. Dubuque, 1 Wall. 175. The facts in that case were these: The state of Iowa had authorized the city of Dubuque to issue its bonds, in aid of the construction of a certain railway, and in pursuance of that act the city had issued and sold certain of those bonds to the plaintiff. Suit was brought for the interest coupons of those bonds. The city declined to pay, upon the ground that the act permit-

ting it to issue the bonds was unconstitutional, and in support of this contention relied upon the decision of the state court to that effect.

It appeared that in 1853 the Supreme Court of Iowa had decided that a similar act was constitutional, and that this decision had been affirmed in several subsequent cases. At the time the bonds were issued and sold the correctness of these decisions had not been questioned. Subsequently to that time the Supreme Court of Iowa reversed its earlier decisions and held that the legislation in question was unconstitutional.

Under these circumstances this court held that the contracts between the city and the plaintiff must be interpreted and enforced according to the law as it was supposed to exist when they were entered into, and that no subsequent change in respect of that law, whether by legislative enactment or judicial decision, could be allowed to impair the obligation of those contracts.

The import of those decisions is, that so long as the parties had contracted in view of the previous decisions of the court, those decisions entered into and became a part of their contract. The parties had consented to be bound by the law as interpreted when the contract was made, and they could not afterwards object that this law was invalid. All the cases from this court are exactly like the original case, and no case has ever gone further than that case went. They simply hold that the contract rights of parties cannot be affected by a subsequent change in the law, and that a change of judicial interpretation comes under this head.

Now what possible analogy is there between that class of

cases and the case under consideration? How can it be said that these parties have contracted to be bound by the terms of this act? The original contract was made in 1870, and the modification in February, 1876. At neither of these dates was railroad property taxed at all. The State Tax on Railway Gross Receipts case was decided in 1872. This act was not passed until 1882, and up to that time there had been no legislation of this sort in Vermont. Can it be claimed that the parties consented to be bound by this law in virtue of a contract which was made two years before the decision of this court in State Tax Gross Receipts and twelve years before the enactment of the Vermont statute?

Every step in the transaction was, therefore, *in invitum* and out of which there could grow no waiver or conclusion of any rights whatever. There is then not the slightest analogy between this case and the municipal bond cases relied upon by the state court.

If it should be urged that the parties contracted in reference to the inherent right of taxation in the state, it can certainly have been only with reference to a constitutional exercise of the right by the state. It cannot be said that the plaintiff impliedly agreed that the State of Vermont might impose upon it an unconstitutional tax.

The defendant insists, and the Supreme Court of Vermont has decided, that the Central Vermont Company was merely a collector of this tax. Assume this to be the fact. Suppose this suit was brought against some person who, as tax collector, had collected this tax from the plaintiff and paid it over to the State of Vermont. He has received from the

state treasurer a regular warrant for the collection of this tax; he is commanded by the laws of the state, under a heavy penalty, to proceed with the collection. The plaintiff refuses payment, and he distrains and sells its property and passes the proceeds over to the state. The plaintiff brings suit for the distraint of its property. Could the collector justify his action upon the plea that during the time while the taxes in question were accruing the state statute had been supposed to be valid?

In Bank v. Osborne the state treasurer broke into the vaults of the plaintiff and took out $100,000 in specie in obedience to the laws of the State of Ohio. Now if the theory of the Supreme Court of the State of Vermont be correct, and this court had decided in some previous case that a law similar to the Ohio statute was valid, it must have said in that case to the parties, the law under which Mr. Osborn has acted is invalid under the Constitution of the United States, and in the future neither he nor any other state treasurer must collect a similar state tax, but in this particular instance Mr. Osborn may retain the $100,000 which he has taken.

The validity of the Vermont act is to be finally determined by the decision of this court. According to the varying decisions of this court, if they do vary, that act may be invalid today and valid tomorrow, or *vice versa*, but it cannot be both valid and invalid at the same time. If the parties upon the supposition that the act is valid have voluntarily proceeded to contract under it, neither should be allowed subsequently to deny the validity of their acts, for they have consented to be bound by the terms of the statute. They are bound not by an unconstitutional law, but by their voluntary

acquiescence in that law. But if the law is in fact unconstitutional, no person can be concluded by it against his will nor divested of his property under it against his will, and that is precisely the result here if the plaintiff be not allowed to recover of the defendant the amount due it under the contract.

The defendant urges that it might have subjected itself to severe penalties by failure to retain and pay over this tax, and that if it is compelled to pay the rent now, it will be compelled in effect to lose a large sum which it has already paid by way of taxes.

This hardship is more apparent than real. The defendant stands like any collector who has illegally taken the property of a plaintiff for taxes and paid the tax over to the state. The defendant paid over these taxes in obedience to the command of the state, and to avoid the possible penalties which the state had imposed. If that law be unconstitutional and invalid, as a matter of course the state will reimburse its collector for the sums which it has collected and paid to it.

Upon the other hand the plaintiff has no claim either moral or legal against the state, and if not permitted to collect of its debtor the amount due it in this suit, must lose that sum entirely.

IV.

If the decision of the Vermont court, that the act although invalid as a regulation of commerce, would nevertheless protect the defendant, was erroneous, has this court jurisdiction to review that judgment?

Just what was it that the Vermont court held? It was that the statute of 1882, while invalid in fact, was nevertheless, *as a statute*, binding upon the plaintiff. The statute was to be treated as in all respects legal precisely as though it were in fact constitutional. The language of the court is this:

"The supreme court of the United States is the supreme arbiter when a federal question is involved. Down to 1887 that court ruled the federal question now under consideration in a way that upheld the legislation in question. Those decisions then promulgated were the supreme law of the land, absolutely binding upon both parties in this cause. Hence, all payment of taxes made under our law which down to that time must be treated as valid for present purposes, were made in strict conformity of law."

The court held both in express terms and by necessary implication from its judgment *that the act was binding upon these parties*. Can that decision be reviewed here?

The Constitution of the United States has guaranteed to all persons that no State shall pass certain laws. To insure the enforcement of this guaranty the statutes of the United States provide that judgments of a State court in which is drawn in question the validity of a State statute, or the authority exercised under a State statute, upon the ground that it is repugnant to the Constitution of the United States, may be reviewed by this court. It is both the statute and the authority exercised under it which is guarded against. The objective point is the protection of the citizen from the unlawful acts of the State. It is not the enactment of an unconstitutional law but its enforcement that infringes the rights of the citizen, and it is the invasion of those rights which it is the duty of this court to prevent.

The Federal Constitution declares that no state shall pass a law which regulates commerce between the states, or which impairs the obligation of a contract. The defendant has promised to pay the plaintiff a sum of money. It concedes that it has not paid according to its contract. As an excuse for not paying it sets up the statute of the State of Vermont. It makes no other excuse. The only question before the Vermont court is whether that statute protects the defendant. The plaintiff says it does not because it is repugnant to the Constitution of the United States, and upon that question comes to this court. The power to declare that act unconstitutional carries with it, by necessary implication, the power to further declare that, *as an act*, it is not binding upon the plaintiff; and unless that be so, the right of appeal in this case is a senseless formality.

The practical question is, can the plaintiff be divested of its property by virtue of this statute? That question this court has the power to answer, and to make its answer effectual. If the state court can hold that this statute is unconstitutional and neverthless binding as a statute, and if the citizen is thereby cut off from all redress in this court, the Federal Constitution becomes a nullity.

If the Vermont court could say that this law was to be treated as valid, because so declared by judicial interpretation, it might also say that it was presumed to be valid until declared invalid by some court of competent jurisdiction, and that, therefore, whatever was done under an unconstitutional act was to be regarded as rightfully done until this court had pronounced it unconstitutional. Would not such a decision

present a case for the interposition of this court? If not, what protection has the citizen?

The remedy is an essential part of the obligation. It has been repeatedly held that the legislature cannot take away nor materially change the remedy existing when a contract is entered into without impairing its obligation. When this contract was made the plaintiff could enforce the payment of its stipulated rent. Under the decision of the Vermont court that right is absolutely taken away. That decision must be reviewable here.

Gunn v. Barry, 15 Wall. 610.
White v. Hart, 13 Wall. 646.
Hoffman v. Quincy, 4 Wall. 535.
Edwards v. Kearzey, 96 U. S. 595.
Louisiana v. Pillsbury, 105 U. S. 278.

The authorities all hold that when the validity of a statute under the Federal Constitution is drawn in issue, this court has the fullest power to review every incidental matter which enters into the determination of the question. Does the judgment of the state court infringe the right of the citizen, so far as that right is guaranteed under the Constitution of the United States? The state court cannot escape this power of review by resting its judgment upon some principle of general law, *provided that judgment gives effect to the statute drawn in question.*

Bridge Prop'rs v. Hoboken Co., 1 Wall. 116.
Jefferson Branch Bank v. Skelley, 1 Black 436.
Delmas v. Insurance Co., 14 Wall. 661.
University v. People, 99 U. S. 309.
Given v. Wright, 117 U. S. 648.

In Bridge Prop'rs v. Hoboken Co., 1 Wall. 116, the plaintiffs in error claimed the exclusive right to construct a bridge within certain limits under a charter from the state of New Jersey, and that the state, by granting to the defendants a charter to construct its bridge within these limits had impaired the obligation of the contract. The state court decided that the plaintiffs had not, under their charter, the exclusive right claimed. It was not denied that if they had, the charter of the defendant was invalid. It was insisted by the defendant that this was a question of general law upon which the decision of the state court presented no Federal question. This court held otherwise in this language:

"It is said, however, that it is not the validity of the act of 1860 which is complained of by the plaintiffs, but the construction placed upon that act by the state court. If this construction is one which violates the plaintiffs contract and is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and that this court will not be discharging its duty to see that no state legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction of such cases."

In Jefferson Branch Bank v. Skelley, 1 Black 436, the plaintiff brought suit against the defendant for having broken into its vaults and taken out certain specie. The defendant justified as a tax collector under a warrant regularly issued to him in pursuance of the laws of the state. The plaintiff repiied that the tax was void, for that the law imposing it impaired the obligation of the contract existing between it and the state by virtue of the 60th section of the Ohio Banking Act of 1845. The state court held that this reply was no answer to the defendant's justification, for that the said 60th section did not constitute a contract between the bank and the

state. Whether the said act would have impaired the obligation of that contract, had one existed, was not considered.

Upon a writ of error from this court to review that judgment, it was objected that upon the construction of a state statute the declarations of the state court were binding upon the Federal Court, and that, therefore, no federal question was presented by the record. This court held that its power to determine whether a contract had been impaired, necessarily carried with it the further right to inquire whether there was a contract to impair, and that upon that point the decisions of the state court were not controlling.

Mr. Justice Wayne said:

"Of what use would the appellate power be to some litigant who feels himself aggrieved by some particular state legislation if this court could not decide independently of all adjudication of the supreme court of the state, whether or not the phraseology of the instrument in controversy was expressive of the contract and within the protection of the constitution of the United States, and that its obligation should be enforced, notwithstanding the contrary conclusion by the supreme court of the state."

In Delmas v. Ins. Co., 14 Wall. 661, the court, at page 668, said:

"Besides, this court has always jealously asserted the right when the question before it was the impairing of an obligation by state legislation, to ascertain whether there was a contract to be impaired. If it were not so the constitutional provision could always be evaded by the state court's giving such construction to the contract, on such conditions concerning its validity as to render the power of this court of no avail in upholding it against unconstitutional legislation."

Given v. Wright, 117 U. S. 648, presented the exact question under discussion. Certain lands in New Jersey had by

legislative enactment been set apart to the Indians of that state. The act provided that they should be free from taxation. This was in 1778. In 1801, at the request of the Indians, an act was passed providing that these lands should be sold, and the proceeds invested for the benefit of the Indians, which was done. Nothing was said in this act about the exemption from taxation, and the New Jersey court held that the lands were exempt in the hands of the new purchasers. In 1804, after the rendition of this judgment, the legislature repealed the exempting clause of the original act, and the state court then held that the lands were then subject to taxation. This decision was reversed upon appeal to the United States Supreme Court, New Jersey v. Wilson, 7 Cranch 164, where it was held that the act of 1804 violated the obligation of the contract.

Notwithstanding this decision the lands were regularly assessed and the taxes paid down to 1876, when proceedings were begun in the state court to prevent the collection of these taxes. The state court sustained the assessment, holding that the uninterrupted payment of these taxes for more than sixty years raised a conclusive presumption that the exemption had been surrendered. To review this judgment a writ of error was prosecuted in this court.

The plaintiffs insisted that the state statute impaired the obligation of the contract. The state court said this was true, but that nevertheless the plaintiffs were not entitled to the benefit of the exemption clause by reason of the application of certain general principles of law. This court held that a federal question was involved and that the federal

court should consider whether the state court had correctly applied those principles which deprived the plaintiffs of the exemption which they claimed.

Mr. Justice Bradley said:

"The question thus will be whether the long acquiescence of the land owners under the imposition of taxes raises a presumption that the exemption which once existed has been surrendered.

"This question by itself would be a mere question of state municipal law, and would not involve any appeal to the Constitution or laws of the United States. But where it is charged that the obligation of a contract has been impaired by a state law, as in this case, by the general tax law of New Jersey as administered by the state authorities, and the state courts justify such impairment by the application of some general rule of law to the facts of the case, it is our duty to inquire whether the justification is well grounded. If it is not, the party is entitled to the benefit of the constitutional protection."

The case at bar should be carefully distinguished from those in which the state court puts its decision upon an independent ground. By independent ground is meant some ground apart from the statute, upon which the case may have been decided without any reference to the statute. If the judgment of the state court necessarily *gives effect* to the statute, a federal question is presented.

Lehigh Water Co. v. Easton, 121 U. S. 388.

Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 579.

Dale Tile Mnfg. Co. v. Hyatt, 125 U. S. 46, 51.

C. A. PROUTY,

GEO. F. EDMUNDS,

Of counsel for Plaintiff in Error.

STATUTES OF VERMONT.

No. 1. ACTS OF 1892.—AN ACT TO PROVIDE A REVENUE FOR THE PAYMENT OF STATE EXPENSES.

It is hereby enacted by the General Assembly of the State of Vermont:

SECTION 1. Funds for the payment of state expenses shall be raised by direct state taxes upon the corporate franchise or business in this state of railroad, insurance, guarantee, express, telegraph, telephone, steamboat, car and transportation companies, savings banks, savings institutions and trust companies as provided in this act and shall be payable in money to the state treasurer for the use of the state.

COMMISSIONER OF STATE TAXES.

SEC. 2. The govenor, in the year 1882, and biennially thereafter, shall appoint, with the advice and consent of the senate, a commissioner of state taxes whose term of office shall commence at the time of his appointment and continue until his successor is appointed. Vacancies in such office shall be filled by the governor. He shall report biennially to the general assembly, and his report shall be printed with the Vermont state officers' reports. Such commissioner shall receive from the state treasury an annual salary of one thousand dollars and his necessary expenses incurred in

the discharge of his duties; but no account for clerk hire, fuel, lights or rent shall be allowed to such officer.

RETURNS.

SEC. 3. The commissioner of state taxes shall send by mail, or otherwise furnish to the principal office of each corporation, company, person or persons required by this act to pay a tax to the state, and to such agents in this state of foreign insurance companies as do not make returns to other agents in the state, blanks in triplicate so formulated as to require a statement of all facts necessary to determine the amount of each annual or semi-annual tax to be paid by such corporation, company, person or persons.

SEC. 4. Every corporation, company, person or persons, required by this act to pay a tax to the state, and the agents of foreign insurance companies specified in the preceding section, shall cause such blanks to be filled out with a full statement of all matters therein required, and with full answers to all interrogatories therein contained, and shall cause the same to be returned as provided in the following section. Such blanks so filled out shall be signed and sworn to by the treasurer, cashier, or chief financial officer of the corporation, company, or by the person or persons making the return.

SEC. 5. Blanks filled out and sworn to, as provided in the preceding section, shall be returned, one copy to the commissioner of state taxes and one copy to the state treasurer, annually in the month of February for the year terminating with the last day of December next preceding, or semi-annually in the month of February and August for the semi-annual period terminating with the last day of December or June next preceding, respectively, according to the subsequent provisions of this act; and one copy shall be

retained by the corporation, company, person or persons making such returns.

PAYMENT OF TAX.

SEC. 6. At the time of making a return the corporation, company, person or persons making the same, except agents of foreign insurance companies, shall forward to the state treasurer the amount of the annual or semi-annual tax for the period covered by such return. Each annual tax due from foreign insurance companies shall be paid by such company to the state treasurer within the time limited by this act.

PENALTIES.

SEC. 7. A corporation, company, person or persons whose duty it is to make a return to the commissioner of state taxes, who fails to do so within the time required by this act shall forfeit to the state one hundred dollars for each day's neglect to make such return.

SEC. 8. A corporation, company, person or persons failing to pay the amount of any annual or semi-annual tax within the time required by this act shall forefeit to the state the sum of one hundred dollars for each day's neglect to pay the same after the expiration of the time limited by law.

SEC. 9. If a foreign insurance company, or an agent of a foreign insurance company, fails to make a return as required by this act, or if a foreign insurance company fails to pay a tax to the state as required by this act, the commissioner of state taxes shall notify the insurance commissioners of this state and such commissioners shall thereupon revoke

the license of such company to do business in this state, and shall revoke the licenses of all agents of such company in this state; and notice and publication of such revocation shall be made in the same manner as provided in case of a revocation under section three thousand six hundred and twenty-two of the Revised Laws.

SEC. 10. Taxes and penalties imposed by this act shall be recovered with costs in an action of debt brought in the name of the state. The commissioner of state taxes shall cause such suits to be instituted within thirty days after default in making a return or paying a tax. The amount of penalties accrued up to the time of trial may be recovered in such suit. But if the commissioner is satisfied that default was owing to the failure to receive blanks or other unavoidable cause he may remit the penalties accrued and extend the time for making a return or paying a tax not exceeding thirty days.

RAILROADS.

SEC. 11. Every corporation, person or persons owning or operating a railroad in this state whether as owner, lessee, receiver, trustee or otherwise, shall pay a tax to the state on the entire gross earnings of such railroad, if such railroad is situated wholly within the state. If such railroad is situated partly within and partly without the state the tax shall be upon such proportion of the entire gross earnings of such railroad as the mileage of trains run in this state bears to the mileage of all the trains run on the entire main line of the road.

SEC. 12. The tax upon such earnings shall be rated according to the earnings per mile of road in this state, and is hereby assessed, at the rate of two per cent on the first two thousand dollars a mile or total earnings if less than that sum; at the rate of three per cent on the first thousand or part thereof above two thousand dollars a mile; at the rate of four

per cent on the first thousand or part thereof above three thousand dollars a mile; and when the earnings exceed four thousand dollars a mile, at the rate of five per cent on all earnings above that sum.

SEC. 13. Such tax shall be payable one-half semi-annually in the months of February and August and shall be based upon the gross earnings during the six months terminating with the last day of December or June next preceding.

SEC. 14. When a railroad is operated in this state by a corporation, person or persons by virtue of a lease or other contract, the aforesaid tax shall be paid by the lessee of such railroad or holder of such contract as the case may be; and the said tax shall be charged against and deducted from any payments due or to become due the lessor of such railroad, or person, persons or corporation granting such contract, as the case may be, on account of such lease or contract; unless in the provisions of such lease or contract it is stipulated otherwise.

SAVINGS BANKS, SAVINGS INSTITUTIONS AND TRUST COMPANIES.

SEC. 18. Every savings bank and savings institution incorporated by this state and doing business herein shall pay a tax to the state, which is hereby assessed, at the rate of one-half of one per cent annually upon the average amount of its deposits and accumulations, deducting therefrom the average amount of its assets invested in real estate owned by such corporation, and also amount, if any, of individual deposits in excess of fifteen hundred dollars each, listed to depositors in towns in this state where such depositors reside.

SEC. 19. Every trust company and "savings bank and trust company" incorporated by this state and doing business herein shall pay a tax to the state, which is hereby assessed,

at the rate of one per cent annually upon the average amount of its deposits, including money or securities received as trustee under order of court or otherwise, deducting therefrom such percentage as such institution pays to the United States government so long as such tax is paid, and also the average amount of its assets invested in real estate owned by such corporation, and also amount, if any, of individual deposits in excess of fifteen hundred dollars each, listed to depositors in towns in this state where such depositors reside.

SEC. 20. The tax assessed by the two preceding sections shall be payable one-half semi-annually in the months of February and August, and shall be based upon the average amount of its deposits and accumulations in case of savings banks, and the average amount of its deposits in case of trust companies and "savings banks and trust companies," during the six months terminating with the last day of December or June next preceding. No other tax shall be assessed on such deposits or accumulations in case of savings banks, or on such deposits in case of trust companies and "savings banks and trust companies," or against the depositors on account thereof, except individual deposits exceeding in the aggregate fifteen hundred dollars.

EXPRESS, TELEGRAPH AND TELEPHONE COMPANIES.

SEC. 21. Every corporation, joint stock company, person or persons doing express business in this state shall pay a tax to the state, which is hereby assessed, at the rate of three per cent annually on the gross receipts of their business transacted in this state.

SEC. 22. Every corporation, joint stock company, person or persons doing telegraph business in this state shall pay a

tax to the state, which is hereby assessed, at the rate of three per cent annually on the gross receipts of their business transacted in this state.

SEC. 23. Every corporation, joint stock company, person or persons doing telephone business in this state, shall pay a tax to the state, which is hereby assessed, at the rate of three per cent annually on the gross receipts of all their business in this state, including sums received for rental of instruments. But there shall be deducted from such gross receipts the amount paid by such corporation, company or persons to any telegraph company with whom they are connected.

SEC. 24. The tax assessed upon express, telegraph and telephone companies or persons doing such business shall be paid one-half semi-annually, in the months of February and August, and shall be based upon the business for the six months ending with the last day of December or June next preceding.

STEAMBOAT, CAR AND TRANSPORTATION COMPANIES.

SEC. 25. Every steamboat, car or transportation company incorporated under the laws of this state shall pay a tax to the state, which is hereby assessed, at the rate of two per cent annually on the gross receipts of all their business. Such tax shall be payable one-half semi-annually in the months of February and August, and shall be based upon the gross receipts of such business during the six months terminating with the last day of December or June next preceding.

POWER OF COMMISSIONER TO EXAMINE AND RE-ASSESS.

SEC. 26. The commissioner of state taxes may examine upon oath any officer, agent or clerk of a corporation or per-

sons operating a railroad or doing express, telegraph or telephone business in this state, or of an insurance company doing business in this state, or of a savings bank, savings institution or trust company incorporated by this state and doing business herein, or of a steamboat, car or transportation company incorporated under the laws of this state, and may examine any book of accounts kept by such corporation, company or persons, concerning all matters as to which information is required to carry out the purpose of this act.

SEC. 27. Any such officer, agent or clerk who refuses to be sworn or to testify with reference to the matters as to which he is required to testify by the preceding section, or who refuses to show to the commissioner such books of account, shall be fined not less than five hundred and not more than five thousand dollars.

SEC. 28. If the commissioner of state taxes finds that owing to the incorrectness of a return or to any other cause a tax paid is too small, he shall assess an additional tax sufficient to cover the deficit, and shall forthwith notify by mail the parties so assessed. If such additional assessment is not paid within thirty days after notice as above, the corporation, company, or person on whom it is assessed shall be liable to the same penalties as for neglect to pay a semi-annual or annual tax.

MODIFICATIONS OF PRESENT LAW.

SEC. 29. Real and personal estate used in operating a railroad or used in carrying on express, telegraph or telephone business in this state, and real and personal estate owned by steamboat, car, and transportation companies taxed by this act, also stock in steamboat, car and transportation companies, which companies are taxed by this act, shall not hereafter be set in the grand list, and shall not be

required to be stated in the inventories required to be returned to listers by section three hundred and twenty-four of the Revised Laws. And listers in making annual grand lists hereafter shall omit from the last quadrennial appraisal all real estate mentioned in this section. But this act shall not be construed to take out of the grand list of 1882, or of any previous year, any property included in such lists, or to diminish the liability of any person to the payment of taxes assessed or to be assessed on such lists.

No. 5, Acts 1884.—AN ACT IN AMENDMENT OF SECTIONS 5, 6, 12, 17, 18 AND 19 OF SESSION LAWS, NO. 1 OF 1882, ENTITLED "AN ACT TO PROVIDE A REVENUE FOR THE PAYMENT OF STATE EXPENSES."

It is hereby enacted by the General Assembly of the State of Vermont:

SECTION 1. Section five (5) of the Laws of 1882, entitled "An act to provide a revenue for the payment of state expenses," approved November 28, 1882, is hereby amended so as to read as follows: Blanks filled out and sworn to, as provided in the preceding section, shall be returned, one copy to the commissioner of state taxes and one copy to the state treasurer, annually, on or before the fifteenth day of February, for the year terminating with the last day of December, next preceding; or semi-annually, on or before the fifteenth day of February, and the fifteenth day of August,

for the semi-annual period terminating with the last day of December or June next preceding, respectively, according to the subsequent provisions of this act; and one copy shall be retained by the corporation, company, person or persons making such returns.

SEC. 2. Section six of said act is hereby amended so as to read as follows: On or before the last day of the month of February and August, in which returns are to be made as required by the preceding section, the corporation, company, person or persons making such returns, except agents of foreign insurance companies, shall forward to the state treasurer the amount of the annual or semi-annual tax for the period covered by such return. Each annual tax due from foreign insurance companies shall be paid by such company to the state treasurer within the time limited by this act.

SEC. 3. Section twelve of said act is hereby amended so as to read as follows: The tax upon such earnings shall be rated according to the earnings per mile of road in this state, and is hereby assessed at the rate of two per cent upon the first two thousand dollars a mile of total earnings, if less than that sum; at the rate of three per cent on the first thousand or part thereof above two thousand dollars a mile; at the rate of four per cent on the first thousand or part thereof above three thousand dollars a mile; and when the earnings exceed four thousand dollars a mile, at the rate of five per cent on all earnings above that sum. If more than one road is operated by any corporation, company, person or persons, the returns required to be made by section five of this act shall be made for each and every of such roads separately, and the tax assessed by this section shall be rated according to the earnings per mile of each of said roads in this state.

Office Supreme Court, U. S.
FILED
OCT 21 1895
JAMES H. McKINNEY.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

No. 366

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1894

JAMES STEWART,
Plaintiff in Error,

v.

DANIEL S. C. McHARRY,
Defendant in Error

E. W. McGRAW,
THEO. WAGNER,
Counsel for Plaintiff in Error.

FILED DECEMBER 1894.

W. A. WOODWARD & CO., PRINTERS, 12 SUTTER ST., S. F.

Office Supreme Court, U. S.
APR 8 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

THE RUTLAND RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE CENTRAL VERMONT RAILROAD COMPANY.

No. 299.

THE SAME

vs.

THE SAME.

No. 330.

BRIEF FOR DEFENDANT IN ERROR.

E. J. PHELPS, AND
B. F. FIFIELD,
Counsel.

The Evening Post Job Printing House, New York.

Supreme Court of the United States.

October Term, 1894.

THE RUTLAND RAILROAD CO., Plaintiff in Error, vs. THE CENTRAL VERMONT RAILROAD CO.	No. 299.
THE SAME vs. THE SAME.	No. 830.

BRIEF FOR THE DEFENDANT IN ERROR.

Statement.

On the 30th of December, 1870, the plaintiff in error, the Rutland Railroad Company, leased its road, together with the use of a branch called the Addison Railroad, for twenty years, to the trustees and managers of the Vermont Central and Vermont and Canada Railroads, who were then acting as receivers under the direction of the Court of Chancery of Vermont, at a fixed rental, payable in money. The lease contained no provision in respect to the payment of taxes upon the leased

property. The trustees and managers took possession of the road under the lease, and continued in the occupation of it until June 21, 1873, when the Central Vermont Railroad Company, the defendant in error, succeeded to the trust, and took possession of the Rutland road under the existing lease (*Record, pp.* 7–10).

Disputes having arisen between the parties, the same were compromised and settled, and a new basis of rent agreed upon, on the 23d of February, 1876, by a new contract in writing of that date. The only provision in it necessary to be considered here is as follows: "The gross earnings of the Vermont Central and the Vermont and Canada, Rutland, and Addison Roads shall be semi-annually added together. Of the aggregate sum so arrived at there shall be set apart 36¼ per cent. thereof as the share of the said Rutland and Addison Railroad of said gross earnings, out of which share the party of the second part (The Central Vermont Railroad Company) may retain 75 per cent. as an agreed proportion, for the payment of all expenses of operating said Rutland and Addison Railroads, and maintaining said roads, their structure and equipment, in good order and condition, and keeping the same in repair; and of all other expenses incumbent upon the party of the second part in the operation of said railroad under and as is provided in said contract of December 30, 1870. And said party of the second part shall pay over to the party of the first part, as hereinafter provided, the balance, being 25 per cent. of the said 36¼ per cent. Provided, however, that the said party of the second part hereby agrees and does hereby guarantee that the amount ascertained as aforesaid and payable to the party of the first part, shall amount to not less than $250,000 for each and every year, commencing February 1, 1875, during the continuance of said contract, as modified hereby" (*Record, pp.* 10–12).

In 1877, after this modified contract, a further dispute arose between the parties as to which

should pay the taxes upon the Rutland Railroad, both the lease and the modified contract being silent on that subject.

The statute of Vermont at that time taxed railroads by the mile, and the road was put in the list for taxation in the various towns through which it ran. There was no provision in the statute authorizing the lessee to deduct the taxes from the rent, but the Central Company claimed the right to do so, on the ground that the lease containing no stipulation for the payment of taxes by the lessee, the burden of taxation rested by law on the lessor; and that the legal right of the lessee, if it paid the taxes, was to deduct them from the rent. Thereupon the Rutland Company filed its bill in Chancery, praying, among other things, "that the lease and modification thereof may be construed, and the rights and liabilities of the parties thereunder may be determined, touching their duty and obligation or the duty and obligation of either to pay said taxes so assessed as aforesaid, as well as all future taxes that may be assessed on the real estate of your orator, and said trustees and managers."

The case was fully argued, and was decided by the Supreme Court of Vermont at the January Term, 1878. The mandate declared that "the defendant (the Central Vt. Railroad Co.) is not liable to pay taxes assessed upon the property of the Rutland Railroad Company." The case is not reported, but the record in it was before the State Court in this case, and is fully stated in its opinion (*Record*, p. 40).

In 1882 the aforesaid statute taxing railroads was repealed, and the one now under consideration was enacted in its place. Secs. 1, 11, 12, 14 and 8 are the only ones necessary to be considered.

Sec. 1. Funds for the payment of State expenses shall be raised by direct State taxes upon the corporate franchise or business in this State of railroad, insurance, guarantee, express, telegraph, telephone, steamboat, car and transportation companies,

saving banks, saving institutions and trust companies as provided in this act, and shall be payable in money to the State Treasurer for the use of the State.

Sec. 11. Every corporation, person or persons, owning or operating a railroad in this State, whether as owner, lessee, receiver, trustee or otherwise, shall pay a tax to the State on the entire gross earnings of such railroad, if such railroad is situated wholly within the State. If such railroad is situated partly within and partly without the State, the tax shall be upon such proportion of the entire gross earnings of such railroad as the mileage of trains run in this State bears to the mileage of all the trains run on the entire main line of the road.

Sec. 12. The tax upon such earnings shall be rated according to the earnings per mile of road in this State, and is hereby assessed at the rate of two per cent. on the first two thousand dollars a mile of total earnings; if less than that sum, at the rate of three per cent. on the first thousand or part thereof above two thousand dollars a mile; at the rate of four per cent. on the first thousand or part thereof above three thousand dollars a mile; and when earnings exceed four thousand dollars a mile, at the rate of five per cent. on all earnings above that sum.

Sec. 14. When a railroad is operated in this State by a corporation, person or persons, by virtue of a lease or other contract, the aforesaid tax shall be paid by the lessee of such railroad or holder of such contract, as the case may be, and the said tax shall be charged against and deducted from any payments due or to become due the lessor of such railroad, or person or persons, or corporation granting such contract, as the case may be, on account of such lease or contract, unless in the provisions of such lease or contract it is stipulated otherwise.

Sec. 8. A corporation, company, person or persons failing to pay the amount of any annual or semi-annual tax within the time required by this act shall forfeit to the State the sum of one hundred dollars for each day's neglect to pay the same after the expiration of the time limited by law.

(*For full copy of this act see Laws of Vermont for* 1882, *pp.* 3-11.)

After this statute went into effect the Central Company regularly paid the taxes assessed under it upon the leased property from 1883 to 1888, inclusive, as it had done under the previous statute, amounting in the whole to about $75,000, and deducted the amount so paid from the rent as it accrued. This course of business went on without any objection on the part of the Rutland Company, except in a letter hereinafter referred to, which does not touch the point of the present contention.

The taxes thus paid were assessed upon the gross earnings of the Rutland road, a considerable part of which was derived from interstate business. No discrimination was attempted between local and interstate earnings, it being then understood by all parties that, under the previous decisions of the Supreme Court of the United States, taxation of the interstate earnings of a corporation of the State was valid. But in 1887 a later decision of that Court on the subject was promulgated, which is understood to hold that the taxation upon the gross receipts of a railroad company is, so far as such receipts are derived from interstate business, unconstitutional. Before the decision last mentioned was made, other questions had arisen between the Rutland and Central Companies, relative to the method of computing interest and other matters of computation, in respect of which the Rutland claimed a balance to be due. On the 10th of November, 1886, the Rutland Company had filed a petition in the Court of Chancery for the County of Franklin, in

the State of Vermont, setting forth that an arrearage of rent was due, and praying for an order upon the Central Company to pay it. The Central Company answered the petition, denying any liability. And the cause was referred to a special Master to take the accounts (*Record, pp.* 5–7).

The Master reported the amounts that would be due to the Rutland Company, upon various alternatives of calculation and legal decision, submitting the questions of law to the Court. The Master's report will he found in the *Record, pp.* 7 *to* 24.

On the hearing of the case, the decision of the United States Supreme Court before referred to having in the meantime become known, the Rutland Company for the first time took the ground that the Central was not entitled to be credited with the taxes previously paid and deducted from the rent and now held to be illegal, and that all the rent that had been so applied since 1882 was to be treated as in arrear and unpaid. At the April Term, 1888, of the Court of Chancery, the case was heard upon the pleadings and Master's report, and the petition was dismissed. From this decree the Rutland Company appealed to the Supreme Court, and the case was heard at the General Term in October, 1889. It was held for advisement and reargued at the General Term in October, 1890, when the case was decided, and a mandate sent to the Court of Chancery as follows: "In the matter of the petition of the Rutland R. R. Company, it is considered, adjudged and decreed as follows: The Act of the Legislature of Vermont, entitled an Act to provide for the payment of State expenses, approved Nov. 28, 1882, so far as it imposes a tax upon the gross earnings of railroads derived from interstate transportation of persons or property, is unconstitutional and void, as being in conflict with that clause of the Federal Constitution which confers upon Congress the exclusive power to regulate commerce among the States.

That Section 14 of said act, providing that taxes assessed under said act upon the earnings of rail-

roads operated by lessees thereof shall be paid by such lessees and charged against and deducted from the rents due the lessor of such railroads, is constitutional and valid.

That all taxes paid to the State by the petitionee in accordance with the provision in said Act of 1882, notwithstanding its invalidity as above held, were, as against the petitioner, valid payments, and so *pro tanto* payments in extinguishment of rent due the petitioners. That the petitioner is entitled to recover interest upon the deferred payments of monthly rents mentioned in the Master's report, from the last day of the month on which it is held such monthly payments of rent respectively fell due under the lease and modification thereof mentioned in said report.

The decree of the Court of Chancery is reversed and the cause remanded."

The opinion of the Court is contained in the *Record*, *p.* 35. The dissenting opinion of the Chief Justice, who, however, concurred in the judgment, and dissented only as to the reasons therefor, is reported in the 63 *Vt. Rep.*, *p.* 1, and a copy of it is annexed to this brief.

The case, having been remanded to the Court of Chancery, came before that Court in August, 1891, for a decree pursuant to the mandate of the Supreme Court. The Rutland Company claimed a balance due of $12,481.62. The Central Company claimed that the balance recoverable was $4,475.68. The Court rendered a decree for the larger sum, from which decision the Central Company appealed to the Supreme Court, and the appeal was duly allowed and the cause passed again to that Court. (*Record*, *pp.* 31–33.)

Against this decree of the Court of Chancery, thus appealed from, the plaintiff in error brought its writ of error in August, 1891, being No. 299 of the present term of this Court. This writ of error was undoubtedly premature, the decree to which it is directed not being a final decree. And the de-

fendant in error filed a motion to dismiss it upon that ground.

Subsequently, and at the April Term, 1894, of the Franklin County Court of Chancery, a final decree was made in the cause, against which the plaintiff in error brought a second writ of error, being No. 830 of this term of this Court. (*Record* therein, *p.* 30.)

The plaintiff in error has moved to consolidate these cases, or that they be heard together, to which motion the defendant in error consents, being desirous to avoid delay.

It will be perceived from the foregoing statement that the sole contention between the parties (except as to certain details not revisable or sought to be revised in this court, and in respect to which the decision was in favor of the plaintiff in error) was as to the right of the Central Company to offset against the rent due the Rutland Company the amount of taxes paid by the Central on the leased property, and which were afterwards held by the Supreme Court of Vermont to be unconstitutional.

The references to the Record contained in this brief are to the Record in No. 299, unless otherwise stated.

POINTS.

I.

The case presents no Federal question.

The constitutionality of the Vermont statute referred to, which is the only question sought to be raised by the assignment of error, is not necessary to be regarded in determining the propriety of the judgment under review.

That statute was held by the State Court to be

unconstitutional, so far as it imposes the taxes here in dispute. On that point the decision was in favor of the plaintiff in error; whether correctly or not, will be considered hereafter.

The only remaining controversy was, which of the parties should lose the amount that had been paid by the Central for the Rutland, in discharge of those taxes, before they were held or claimed to be illegal.

That is not a Federal question. Its determination does not depend upon the statute, but on the relation and implied contract of the parties, under which the payments were made.

Upon the facts disclosed in the record, the judgment now sought to be reversed was right at common law, irrespective of the statute. And such was the decision of the State Court.

It is true that one of the grounds on which that Court rested its conclusion was, that the transaction between these parties was to be governed by the law as it then stood, under the previous decisions of the Supreme Court of the United States which held such taxes to be constitutional, and on the sanction of which both parties acted. And this view of the case may, perhaps, be claimed to involve a Federal question.

Its correctness will therefore be examined separately, and will be found to be undeniable. But it was by no means the only ground on which the State Court based its judgment. And if it be discarded altogether, it will still be apparent that the judgment was right.

1. *Taxes on the property of the Rutland in the occupation of the Central as lessee, belonged to the Rutland to pay, no provision to the contrary being contained in the lease.*

Such is the general rule of law.

Taylor's Landlord and Tenant, Sec. 341.

It was so held by the Supreme Court of Ver-

mont in a suit between these parties in 1878, brought expressly to determine that question.

Record, pp. 40–41, *fols.* 54–56.

It was again so held by the same court in the judgment now under review.

Record, same pages.

These decisions are clearly right. But even if they were wrong, they would present no Federal question, and are not revisable here.

2. *By the relation between the parties, as well as by their previous course of dealing, the Central became the agent of the Rutland for the payment of taxes on this property. And the propriety of the payments now in question, as between the two, is to be determined upon the principles of law applicable to that relation.*

(*a.*) The lease under which the Central Company occupied made it an agent for this purpose by operation of law.

Taylor's Landlord and Tenant, supra.

(*b.*) Irrespective of this rule of law, the previous course of dealing between the parties, by mutual consent, made the Central the agent of the Rutland for the payment of taxes on the leased property.

The Central had been lessee of the property since June, 1873. Before the Act of 1882, when the taxes had been assessed by the mile, and collected in the various towns through which the road ran, the Central had always paid and deducted them from the rent. Ever since the passage of that act, from 1883 to 1888, inclusive, the taxes assessed upon the earnings had been paid by the Central, and charged and allowed against the rent as before, with the consent of the Rutland throughout. (*Record, pp.* 16–24, *fols.* 21–32.)

Suppose these taxes were now held legal, and that the statute had not required the lessee to pay them

for the lessor, but the Central as lessee had nevertheless paid them, could the Rutland under these circumstances refuse to credit the Central with such payments, upon the ground of a want of authority from the Rutland to make them? Such authority would be most clearly established by the previous course of business, and has never been denied in this case.

3. *By failing to interpose by proper proceedings, or even by notice to the Central, to prevent the payments of taxes which it was aware were being made semi-annually during all this time, the Rutland waived the objection to their constitutionality, which it alone had the right to make. Not only as against the State which was enforcing their collection, but as against the agent and lessee which paid them. It can no more recover them back from its agent than from the State.*

(*a.*) Whether this waiver arose from its misfortune in not being aware of the defense, or from its fault in not making it, is immaterial. The consequent loss is its own, and cannot be thrown upon an innocent party.

If the rule is to be applied that a party is presumed to know the law, that rule affects the Rutland with much greater force than the Central. Because the law a man is presumed to know is the law that applies to his own case, not to that of another man.

And if actual knowledge of the law in this instance is to be regarded, the Rutland had the same means of obtaining it that the Central had, and the duty of ascertaining it in respect to its own interests was much more imperative.

(*b.*) Many cases have been cited by the plaintiff in error to prove that an unconstitutional law affords no assistance to those who seek to justify under it an act otherwise wrongful, or to enforce a claim

having no other foundation. Authority in support of this axiom is unnecessary. Its truth is not denied.

But two conditions that attend every unconstitutional law are equally clear: 1. That it is void only as against those whose legal rights are affected by it, and who alone are entitled to be heard against it. 2. That if any party so affected chooses to waive the objection, it is lost, and the law becomes obligatory upon him.

Such a statute is therefore not void, as is sometimes loosely said, but voidable; and like all other voidable obligations, is affirmed by the consent or acquiescence of the party who has the right to avoid it.

Ch. Jus. SHAW, in *Wellington and others, Petrs.*, 16 *Pick.*, 96, remarks as follows: "Whether or not a case can be imagined in which an act of the Legislature can be deemed absolutely void, we think it quite clear that when such act is alleged to be void on the ground that it exceeds the just limits of legislative powers, and thus injuriously affects the rights of others, it is to be decreed void only in respect to those particulars and as against those persons whose rights are thus affected. *Prima facie*, and upon the face of the act itself, nothing will generally appear to show that the act is not valid; and it is only when some person attempts to resist its operation and calls in the aid of the judicial power to pronounce it void as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the Legislature, therefore, concurs with well established principles of law in the conclusion that such act is not void, but voidable only; and it follows, as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers."

"A party who has assented to his property being taken under a statute cannot afterwards object that the statute is in violation of a provision of the Constitution designed for the protection of private property. * * * The statute is assumed to be valid until some one complains whose rights it invades."

Cooley's Constitutional Limitations, Chap. VII., Sec. III., marg. p. 164.

Money paid as taxes under an unconstitutional law cannot be recovered back, though paid in ignorance of the unconstitutionality.

Cooley on Taxation, 566, and cases cited.

In respect to a case like the present, Judge Cooley says: "Under some circumstances a party who is illegally assessed may be held to have waived all right to remedy by a course of conduct which renders it unjust and inequitable to others that he should be allowed to complain of the illegality. * * * And some of the cases referred to in the note go far towards holding that a mere failure to give notice of objection to one who with knowledge of the person taxed, as contractor or otherwise, is expending money in reliance upon payment from the taxes, may have the same effect. But the duty to speak must be very imperative to make mere silence operate as an estoppel."

Cooley on Taxation, p. 573, and cases cited.

A more imperative duty to speak than rested on the Rutland in this case, as between itself and the Central, cannot easily be conceived.

(c.) It is an elementary principle also that a party is estopped from repudiating on any ground a course of dealing in which he has acquiesced, especially if he has taken the benefit of it, although in the outset he might have been entitled to object.

And is equally estopped from asserting a right

where he has permitted another innocently to act to his detriment in ignorance of it. Silence where a party ought to speak is a waiver of the right that should have been made known.

Morgan v. *Railroad Co.*, 96 *U. S.*, 716.
Kirk v. *Hamilton*, 102 *U. S.*, 79, citing with approval Ch. Kent's decision in *Wendell* v. *Van Rensselaer*, 1 *Johns. Ch.*, 344.
Dickerson v. *Colgrove*, 100 *U. S.*, 578.
Railroad Co. v. *Dubois*, 12 *Wall.*, 64, and many other cases.

In *Leather Mana. Bank* v. *Morgan*, 117 *U. S.*, 92, where a bank had innocently paid forged checks, and the fraud might have been discovered and corrected if the depositor had examined his passbooks within a reasonable time, it was held that the question was for the jury whether there was due diligence by the depositor or negligence by the bank. And that if by reasonable care the bank could not have discovered a fraud which the depositor, if not negligent, might have discovered, he could not cast the loss upon the bank.

(*d.*) The only notice by the Rutland Company to the Central of any objection whatever to any of the taxes in question, is contained in a letter from the Rutland treasurer to the Central treasurer of the 19th of September, 1883 (*Record, p.* 14, *fols.* 17–17), which the Supreme Court of Vermont very properly held amounted to nothing. (*Record, p.* 42, *fol.* 51.)

Neither treasurer had authority to represent or bind his corporation on such a question. It refers only to the first tax, and was never renewed. It does not raise nor allude to the objection to the taxes now made, and while it mentions an alleged "invalidity" of the tax, does not in any way specify in what the invalidity consists. While in the subsequent conversation between the presidents of the two companies it is shown to have referred to an

entirely different objection, and one which is without any legal foundation. (*Record, p.* 14, *fol.* 17.) It is clear that in that correspondence the question now involved was not in the mind of either party.

When in 1886, three years later, the Rutland Company commenced the present proceeding for the recovery of an alleged balance of rent due, its complaint raised no such point as is now in dispute, and gave no notice of any objection whatever to the validity of the taxes paid by the Central. Indeed, it is apparent from the petition that such objection was not then known by the Rutland to exist. It was brought to recover balances claimed to be in arrear on very different grounds, in respect of which the Rutland did subsequently recover about $20,000; (*Record in No.* 830, *p.* 31, *fol.* 31). And pending that proceeding, the payment of the taxes by the Central went on as before down to 1888, without objection on the part of the Rutland. (*Record, pp.* 16–20.)

(c.) The acquiescence of the Rutland during this long period in the payment of these taxes by the Central, acting in its behalf and under the existing relation between them, raised an implied contract with the Central to allow the payments to apply upon the rent, as they in fact were applied throughout.

Had the Rutland expressly requested the Central to pay the taxes, could it now repudiate the payment on the ground that the decision which led both parties to suppose that the taxes must be paid was afterwards overruled? And how can the obligation of an express contract be greater than that of an implied contract to the same effect?

4. *The Central, as agent of the Rutland in paying the taxes in question, was guilty of no breach of*

duty that would deprive it of the right to charge the payments to its principal, even assuming the taxes paid to have been illegal, and that the illegality had not been waived.

The agent is not a guarantor to his principal of the validity of claims paid for him within the scope of the agency. He is only required to act in good faith, and to exercise due and reasonable care and prudence in ascertaining their obligation. If by the law as it stands when the payment is made the claim is valid, the loss does not fall upon the agent if the law is afterwards held otherwise, provided he is guilty of no negligence or fault.

(*a.*) That the Central in making these payments acted in entire good faith, is not questioned. The conclusive evidence of that, if any were necessary, is found in the fact that throughout the whole period covered by these payments, it paid the same taxes upon its own much larger property without objection.

(*b.*) Nor was the Central Company guilty of any negligence in failing to discover the invalidity of the taxes, if they were invalid.

As the law stood under the decisions of this Court, until after the taxes now in dispute were paid, their constitutionality was established by the final authority—the Supreme Court of the United States.

State Freight Tax, 15 *Wall.*, 232.
Del. R. Tax Case, 18 *Wall.*, 206.

It was not until the case of *Phil. S. S. Co.* v. *Pennsylvania* (122 *U. S.*, 217), decided in May, 1887, and reported some months later, overruling the decision to the contrary in the case of the *State Freight Tax*, that such taxes as these are now assumed to be, were declared unconstitutional. And even in the case of *Fargo* v. *Michigan* (121 *U. S.*, 230), decided only a year earlier, the case of the *State Freight Tax* was virtually affirmed, be-

ing distinguished in its facts from the case then under consideration, and its conclusion not controverted.

If the Rutland, the only party in interest, failed to discover that the statute imposing these taxes was unconstitutional and the existing decisions to the contrary erroneous, how can it claim that the Central, its agent, should have found it out?

Upon the other hand, if the Rutland was so wisely advised as to foresee what the future ruling on the subject would be, how can it justify itself in allowing the payments in its behalf by the Central to go on from 1883 to 1888 without objection, taking no steps for its own protection and giving to the Central no notice of the supposed ground of defense, or that the payments it was making would be repudiated.

(*c.*) Had the Central Company attempted to defend against these taxes, it would have incurred a penalty of one hundred dollars per day from the time they became payable, besides the expenses of the proceedings, if the defense failed, either on its merits, or because the Central had no sufficient interest to entitle it to raise the question.

Statute, *ante*, *p.* 5.

Several years litigation would have been necessary, because only the Supreme Court of the United States could overrule its own previous decisions in favor of the tax.

No request was made or indemnity offered by the Rutland for so costly and hazardous an undertaking.

Can it now claim that the Central should of its own motion have undertaken such an experiment? If it had done so and failed, would it have had any claim upon the Rutland for the enormous penalties and expenses incurred? What else then could it do but pay the taxes?

(*d.*) Nor was it in the power of the Central to set up the defense of the unconstitutionality of the

taxes, had it desired to do so. It was a mere stakeholder, paying the taxes out of the money of the Rutland, having no interest in the question, and no right, so far as these taxes were concerned, which was affected by the statute creating them.

No rule is better settled, as has been before remarked, than that which precludes an attack upon the constitutionality of a law, except by one whose rights are affected by it.

A mere volunteer, suing for the benefit of some other party capable of suing for himself, or for the public at large, has no standing in court.

Had the Central brought a bill to enjoin the collection of this tax, it would have been dismissed at the threshold, upon that ground. The Rutland Company alone could have raised the question.

Waite v. *Dowley*, 94 *U. S.*, 527.

5. *Especially are all these considerations applicable to the case of the plaintiff in error, which comes into a court of equity to obtain relief. It must, therefore, do equity. And that can only be done by reimbursing the defendant in error for the expenditures made in good faith for the benefit of the plaintiff in error, with its own consent and acquiescence, and induced, if wrong, by its own laches.*

A graver injustice can hardly be conceived than the casting the loss, if there be a loss in these payments, upon the defendant in error, which has no interest whatever in the transaction, and has been guilty of no fault capable of being pointed out.

The result that the plaintiff in error seeks to deduce from the alleged unconstitutionality of the statute imposing the taxes upon the property is, not that the State shall be precluded from collecting them, but that they shall be paid to the State by the defendant in error, who in no view of the case is claimed to be under any legal or moral liability for them. In other words, if the taxes upon the Rut-

land are unconstitutional, they shall be paid by the Central, which is in no way to blame.

And the Rutland would thus, at the expense of the Central, escape taxation altogether during all those years.

6. *The Supreme Court of Vermont based its decision substantially upon the grounds hereinbefore stated, as will be seen by reference to its opinion* (*Record, p.* 40, *fol.* 55; *p.* 42, *fol.* 57).

It held that taxes upon the Rutland were for the Rutland to pay; that the law as it then stood made these taxes constitutional; that if the Central declined to pay them it subjected itself to heavy penalties; that the Rutland made no hint or suggestion that the law was unconstitutional, and no offer to indemnify the Central; that "as prudent men the Central could not do otherwise than pay; that it was under no duty to incur the expense and assume the perils of delay of litigation to test the validity of a law passed by the Legislature, and which it had the right to assume was constitutional"; that the Central was compelled to pay; that "in such a case the law implies a request, and the Central would have an action to recover back such payments"; that the Rutland, "coming into a court of equity to obtain the relief prayed for, must do equity; and that it can only do equity by leaving the Central where for the greater part of the time the law has left it, and where for the whole time it has been doing what, as between the parties, the Rutland should have done, and what by its own laches the Rutland has suffered the Central to do, professedly in the Rutland's behalf. Accordingly, the Central is not liable to pay, as rent, the amount paid by it as taxes upon the earnings of the Rutland road."

7. *To give this Court jurisdiction of a writ of error from a State Court, it must affirmatively ap-*

pear that the State Court rested the judgment complained of wholly upon the decision of the Federal question, and that such a decision was necessary to the determination of the case.

If there were two grounds upon which the judgment might have been supported, and the State Court founded its judgment upon both, or if it does not clearly appear upon which it proceeded, this Court has no jurisdiction. Nor will it enquire whether the decision on the non-Federal ground was erroneous.

And even if the judgment rested entirely upon the Federal ground, if that decision was not necessary to be made, and the same judgment would be proper on the facts of the case without it, the judgment will not be reversed.

Nor will this Court ever hold a statute to be unconstitutional until it is necessary so to hold, in order to the proper determination of the case before it.

"To give this Court jurisdiction of a writ of error to a State Court, it must appear affirmatively, not only that a Federal question was presented for decision by the highest court of the State having jurisdiction, but that its decision was necessary to the determination of the case, and that it was actually decided, or that the judgment, as rendered, could not have been given without deciding it."

Cook County v. *Car. Co.*, 138 *U. S.*, 216, reaffirming

De Saussure v. *Gaillard*, 127 *U. S.*, 216.

"When in a State Court two grounds of defense are interposed, each broad enough to defeat a recovery, and only one of them involves a Federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this Court, that the judgment was rested upon the disposition of the Federal question. And if this does not affirmatively appear, the writ of error will be dismissed, unless the defense which

does not involve a Federal question is so palpably unfounded that it cannot be presumed to have been entertained. * * * Inasmuch, therefore, as if the Supreme Court of the State had sustained the defense of the Statute of Limitations we cannot perceive that such decision would have been erroneous, it does not appear that the judgment as rendered could not have been given without deciding the Federal question, or that the decision was necessary to the determination of the case, and that it was actually decided" (per *Fuller, Ch. J., Johnson* v. *Risk*, 137 *U. S.*, 300).

"It does not appear upon what ground the Court of Appeals proceeded in affirming this judgment, but as the case might have been properly determined upon a ground broad enough to support the judgment without resorting to a Federal question, this Court has no jurisdiction." (per Brown, *J.*, in *W. A. Wood Co.* v. *Skinner*, 139 *U. S.*, 297.)

And to the same effect *Klinger* v. *Missouri*, 13 *Wall.*, 257.

"It is well settled that where the Supreme Court of a State decides a Federal question in rendering the judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed, without considering the Federal question."

Harmon v. *Johnson*, 142 *U. S.*, 73.

"Whether the State Court so interpreted the territorial statute as to deny such (Federal) right to the plaintiff in error, we need not enquire, for it proceeded in part upon another and distinct ground, not involving any Federal question, and sufficient in itself to maintain the judgment without reference to that question. * * * Whether sound or not we do not enquire. It is broad enough in itself to support the final judgment, without reference to the Federal question."

Beaupre v. *Noyes*, 138 *U. S.*, 401.

See also

Eustis v. *Bolles*, 150 *U. S.*, 361.
Moore v. *Mississippi*, 21 *Wall.*, 636.
Citizens Bank v. *Bank of Liquidation*, 93 *U. S.*, 141.
N. O. Water Co. v. *N. O. Water Works Co.*, 142 *U. S.*, 84.
Browne v. *Atwell*, 92 *U. S.*, 321.

In the latter case, Waite, *Ch. J.*, after stating the rule as above given, referring to *Murdock* v. *Memphis*, 20 *Wall.*, 590, which had been cited to the contrary, says: "There is nothing in that case to the contrary. * * * We have often since that case affirmed the old rule."

In the present case, if every line of the Vermont statute had been held by the State Court or were now to be held by this Court, to be unconstitutional, the judgment against the plaintiff in error would be precisely the same, upon the facts shown by the record.

II.

The State Court correctly held that the rights of the parties in respect to the payments now in question are to be determined by the law as it stood when those payments were made, under the statute of Vermont and the previous decisions of this Court on the subject, and that the taxes so paid are as between these parties and for the purposes of this case to be regarded as valid.

In Gelpcke v. *Dubuque*, 1 *Wall.*, 175, a statute had been held valid under the Constitution of Iowa by the highest court of that State. Bonds authorized by the statute were thereupon issued and sold.

Subsequently that court held the statute to be unconstitutional, and a suit on the bonds was defended on that ground. The Supreme Court of the United States, while conceding the general rule that the decision of the highest court of a State is conclusive as to the conformity of a law to its constitution, held that the case was to be controlled on that point by the earlier decision, under the law of which they had been issued, and that they were therefore valid.

Miller, *J.*, dissented. But in the later case of *Havemeyer* v. *Iowa County*, 3 *Wall.*, 294, the Court unanimously reaffirmed the decision in *Gelpcke* v. *Dubuque*, and said of it: "This rule was established upon much careful consideration. We think it rests upon a valid foundation, and we feel no disposition to depart from it."

A similar question arose in *Douglass* v. *Pike Co.*, 101 *U. S.*, 667, and the Court said: "We have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds in question were put on the market as commercial paper." * * * "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights, that would be given to a legislative amendmendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contracts acquired under it are concerned, as much a part of the statute as the act itself, and a change of decision is to all intents and purposes the same in its effect on contracts, as an amendment of the law by means of a legislative enactment."

The decision in *Douglass* v. *Pike Co.* was approved and reaffirmed in *Pleasant Township Co.* v. *Ætna Life Ins. Co.*, 138 *U. S.*, 71, and in *Taylor* v. *Ipsilanti*, 105 *U. S.*, '60.

In *Ohio Life Ins. Co.* v. *Debolt*, 16 *How.*, 416, the Court says: "The sound and true rule is that

if the contract when made is valid by the laws of the State, as then expounded by all the departments of its government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the Legislature of the State, *or decision of its courts*, altering the construction of the law."

In *Olcott* v. *Supervisors*, 16 *Wall*, 678, Mr. Justice Harlan, in giving judgment, says: "If a contract, when made, was valid under the constitution and laws of a State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the Legislature *or the judiciary* will be regarded by this Court as establishing its invalidity."

City v. *Lamson*, 9 *Wall.*, 477.
Delmas v. *Ins. Co.*, 14 *Wall.*, 661.
Thompson v. *Perrine*, 103 *U. S.*, 806.
Burgess v. *Seligman*, 107 *U. S.*, 20.
Chan. Kent in Lyon v. *Richmond*, 2 *John. Ch.*, 37; 2 *Hare's Am. Cons. Law*, 723–729 *et seq.*

In *Menges* v. *Dentler*, 33 *Penn. St. Rep.*, 495, it is held that an act making valid a sheriff's sale, which had been decided to pass no title, is unconstitutional.

And in the opinion the Court says: "The law of the land, which gives character to a case, and by which it is to be decided, is the law that is inherent in the case and constitutes a part of it when it arises as a complete transaction between the parties. * * *

It is a plain duty of government, in correcting mistakes in its administration, to see that this shall not be done at the expense of a citizen who has, in good faith, trusted in its guidance, and who had no part in the mistake."

In *Harris* v. *Jex*, 55 *N. Y.*, 421, it appeared that after the decision in *Hepburn* v. *Griswold*, 8 *Wall.*, 605, which held the Legal Tender Act to be uncon-

stitutional, and before that decision was overruled in *Knox* v. *Lee*, 12 *Wall.*, 457, a tender in payment of a mortgage was made in legal tender notes and refused. After the latter decision, in an action to foreclose the mortgage, it was claimed that the tender had discharged the mortgage lien. The Court of Appeals held the contrary, and said: "It is insisted that notwithstanding the fact that at the time the tender was made, the Supreme Court of the United States, the ultimate judicial authority on all questions arising under the Constitution of the United States, had decided that the Legal Tender Act, so far as it applied to debts like that of the plaintiff, was void, and that he was entitled to demand payment of his debts in coin, yet he was bound to know the law to be as it was subsequently declared, and that a refusal to accept the tender involved the loss of his security. I think the law did not impose upon the plaintiff so unreasonable a burden. The claim is sought to be justified by the maxim, *ignorantia juris non excusat.* * * * The reason of the rule has no application to a case like this. The plaintiff had a right to repose upon the decision of the highest judicial tribunal in the land. It was, as applied to the relations between these parties and to this case, the law and not the mere evidence of the law. * * * The transactions of life would be involved in great and distressing perplexity and uncertainty, if the maxim quoted is to be applied and extended to cases like this."

Chancellor Kent observes (1 *Com.*, 476): "If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it."

See also *Woodruff* v. *Woodruff*, 52 *N. Y.*, 53.

It is true that the earlier decisions of the United States Supreme Court referred to, were not upon

the Vermont statute. But they affirmed the constitutionality of the provisions of that statute. And it was upon the faith of those decisions that the statute itself was passed. The principle of the foregoing authorities, therefore, fully applies to the case, if the provisions in question are now to be treated, under the later decisions, as unconstitutional.

On the other hand, if the former decisions do not affect this statute, then the taxes in controversy were valid, and of course properly paid, and the case presents no question at all under the assignment of error.

Under the Constitution of the United States, the decision of the Supreme Court on the question whether a statute contravenes the Constitution does not merely declare the law, but makes it.

On that subject there is no common law to be declared. Decisions on other questions are not binding on other courts, except those immediately subordinate. But this, right or wrong, is conclusive on all courts, whether Federal or State.

The necessary result is that the provisions of a law that have been decided by the Supreme Court of the United States to be constitutional, are to be treated as constitutional until held otherwise by the same Court. And though it has the power afterwards to change its own decisions, intervening transactions are not affected by such change.

Harris v. *Jex*, *supra*.

It is to be observed also, that the constitutionality of the Vermont statute is only incidentally involved in the present enquiry, if it is involved at all.

The question here is not as to the validity of the tax as between the Rutland and the State of Vermont. It is upon the implied contract between the Rutland and the Central, as lessor and lessee, and principal and agent, which mutually assumed the law to be as it then was, and under which contract

the latter has paid the tax at the request of the former, who alone had the right to contest it and did not contest it. The statute and the exigency it created are but facts to be regarded, with other circumstances, in determining the rights of the parties under the situation in which they were placed.

If the law as so assumed is afterwards changed, that cannot affect the contract, or divest rights that have in the meantime been acquired under it.

When the constitutionality of a statute is brought in question collaterally or incidentally, and not between the authority seeking to enforce the statute and the party whose rights are affected by it, the objection will not be considered. The question cannot be raised in that way.

Thus a national bank officer required by a State statute under a penalty to make returns to towns of names of stockholders for purposes of taxation cannot in an action for the penalty set up the unconstitutionality of the tax which the statute sought to enforce, and in aid of which the return was required to be made.

Waite v. *Dowley*, 94 *U. S.*, 527.

A tax collector who has collected money for taxes cannot set up the unconstitutionality of the taxes in defense of an action against him for not paying over the money collected.

Commonwealth v. *Philadelphia*, 27 *Penn. St.*, 497.

A clerk who refused to record orders for the equalization of taxes cannot set up in defense of proceedings against him for such refusal the unconstitutionality of the act under which the orders were issued.

People v. *Solomon*, 54 *Ill.*, 46.

Where a judgment creditor has failed to issue execution to charge attached property within the time required by law, because a later statute afterwards held unconstitutional required it, in an action involving the question whether the lien was lost by

the delay, the unconstitutionality of the statute cannot be set up against him.

Sessums v. *Botts*, 34 *Texas*, 335.
And see Wellington et als., Petrs. 16 *Pick., supra.*

An unconstitutional statute would therefore, beyond doubt, protect an officer acting under it against all but the party whose rights are transgressed by it. If resisted by a volunteer whose rights were not touched by the statute, could it be maintained by such a person that the officer was not an officer and that his process was void?

Especially must the proposition that a statute cannot be attacked collaterally be true, where, as in this case, the party affected by it has waived his objection to its constitutionality and permitted it to be enforced against him, and then seeks to reimburse himself for the consequences out of another party who has no interest in the dispute and is in no way in fault, by raising against that party for the first time the point that the statute is unconstitutional.

III.

The decision of the Supreme Court of Vermont that the Fourteenth Section of the statute in question is valid was right; and, whether right or not, is immaterial here.

The decision relates only to the method of collection provided in the act. And as a part, at least, of the taxes imposed is of unquestioned validity, the point was proper to be determined.

It is contended by the plaintiff in error, that to require the lessee of the property taxed to pay the

taxes out of the rent impaired the obligation of the contract under which the rent was payable to the lessor.

This question does not depend at all upon the constitutionality of the taxes themselves, because the contract would be equally impaired by requiring any taxes at all to be paid by the lessee.

1. *The duty imposed by this section is upon a citizen of the State of Vermont, fully subject to its jurisdiction. And relates to taxes assessed against citizens of the State, upon property within the State.*

2. *That a State in the legitimate exercise of its taxing power may require its citizens who are lessees or custodians of property in the State belonging to other citizens, to withhold from the money derived from it and payable to its owners the amount of the tax assessed upon it against the owners, and to pay the tax to the State, is a proposition established by a long course of decisions, and is beyond dispute.*

Nat. Bank v. *Commonwealth*, 9 *Wall.*, 353.
Lionberger v. *Rouse*, 9 *Wall.*, 463.
Wells Gap. R. Co. v. *Pennsylvania*, 134 *U. S.*, 232.
Quincey v. *Coal Co.*, 147 *U. S.*, 147.
N. Y., L. E. & W. R. Co. v. *Pennsylvania*, 163 *U. S.*, 628.

In the case last cited, a statute of Pennsylvania sought to impose the payment of a tax assessed against its citizens, upon a foreign corporation, not within the jurisdiction of the State, and was held unconstitutional. It was admitted in the argument, and by the Court, th t it might have been required of a corporation which was a citizen of the State, if otherwise unobjectionable.

3. *Such a law impairs no obligation of the contract between the owners and the lessee, because all contracts are subject to the taxing power of the State, and such is therefore their implied obligation.*

Osborne v. *Nicholson*, 13 *Wall.*, 660.
People v. *Cook*, 148 *U. S.*, 397.

It is upon the same principle that land is always subject to the power of eminent domain, however its exercise may interfere with existing contracts.

West Riv. Bridge Co. v. *Dix*, 6 *How.*, 532.
Charles Riv. Bridge Case, 11 *Pet*, 410.

And that contracts are likewise subject to the collection laws of the State, under which money payable to a party may be adjudged in garnishee, trustee or Chancery proceedings, to be paid to a creditor of the party or to a receiver of the Court.

4. *The question of the validity of this section as a method of collection, does not at all affect the present case.*

So far as the taxes were held to be unconstitutional, the method prescribed for their collection becomes immaterial. The Supreme Court of Vermont was not guilty of the absurdity of holding, that although the sections of the act creating the taxes are unconstitutional, that requiring them to be paid is valid. So preposterous a construction is not to be given to the opinion or the conclusion of the Court.

The decision against the plaintiff in error, therefore, did not and could not depend on the validity of the 14th section of the statute, but, as has been already pointed out, upon the facts which rendered the payment of the taxes in question the loss of the party against whom they were assessed, not that of the agent who innocently paid them.

The method of collection provided by the statute relates only to so much of the tax as is valid, and

was so regarded by the State Court. The controversy here concerns that part of it which is supposed to be invalid. The contention of the plaintiff in error that the payments by the Central here in question were only justified by the requirements of the 14th section of the act, is directly opposed to the facts in the case on which, as has been seen, that Court predicated its judgment.

And even if the decision of the State Court had been erroneous upon any or all these grounds, they involved no Federal question and cannot be revised here.

Beaupre v. *Noyes*, 138 *U. S.*, 901.

IV.

The argument has thus far proceeded upon the assumption that the taxes in question are unconstitutional, because they were assessed upon the receipts of interstate transportation. In view of the more recent decisions of this Court, that conclusion is open to grave doubt.

The cases in the United States Supreme Court on this subject are not easy to reconcile. And almost every one of them has encountered serious difference of opinion among the Judges.

That interstate commerce cannot be taxed by a State, may be regarded as settled. That a tax may be laid upon the franchise and property of a railroad company engaged in that business, even though the amount of the tax is graduated by its income, seems to be equally clear. Whether the tax in any given case falls within the one description or the other, is the difficult point.

The majority of the Supreme Court of Vermont held, upon the authority of *Phil. S. S. Co.* v. *Pennsylvania*, *supra*, that the tax in this instance was

upon the receipts of interstate commerce, and was therefore void. The Chief Justice, while concurring in the judgment rendered, dissented upon this question, being of the opinion that the tax was upon the franchise and property of the Rutland Company, and that the earnings were only resorted to for the purpose of fixing the amount. His opinion is reported in 63 *Vermont Rep.*, *p.* 1, and a copy is annexed.

Since that decision the cases of *Home Insurance Co.* v. *N. Y.*, 134 *U. S.*, 194, and *Moore* v. *Grand Trunk R. Co.*, 142 *U. S.*, 217, have been decided, and certainly tend, very strongly, to support the view taken by Chief Justice Ross.

It is not proposed to reopen at length the discussion of this vexed question, because it is conceived to be quite unnecessary to the determination of this case. The argument in favor of the validity of the tax here in question, as a tax upon franchise and property, and not upon earnings, is clearly set forth in the opinion of the Chief Justice of Vermont, to which, and to the cases therein cited, we beg leave to refer. The later decisions above mentioned are recent, and will be fresh in the recollection of the Court.

It would certainly appear to be true, that if the taxes in question are regarded as being assessed upon the earnings themselves, which belong in large part to the lessee, then a tax against the Rutland is assessed upon the property of the Central. This could not have been the intention of the act, and would have been beyond the power of the Legislature. No construction that leads to such a result will be given to a statute, so long as it can be avoided and a more reasonable one accorded.

If the tax upon the Rutland is treated as being upon its property and franchise, and the earnings of the business done over it by the Central were only resorted to as a means of ascertaining the value of the taxed property, as the rental of real estate determines what it is worth, then all the provisions

of the act are harmonized, and the result obviously and, indeed, almost necessarily intended is reached. And no constitutional question arises.

It will be remembered that the only rental received by the Rutland was a percentage of the net earnings of the business of the Central, and that was, therefore, the natural and proper resort in determining the taxable value of the Rutland property.

We respectfully ask the consideration of this question by the Court, if, contrary to our expectation, it is found necessary in the determination of the case.

It is only to be observed, that if these taxes are found to be valid, and the decision of the Supreme Court of Vermont on this point to be therefore erroneous, the whole case of the plaintiff in error falls to the ground. And the judgment of the Vermont Court, being in that view unquestionably right, though based upon wrong reasons, will be affirmed.

Brobst v. *Brock*, 10 *Wall.*, 519.
Burth v. *Child*, 12 *Wall.*, 400.
Bank v. *Bank*, 21 *Wall.*, 294.
Pugh v. *McCormick*, *supra*.

V.

The first writ of error, (No. 299) is not within the jurisdiction of this Court. The judgment on which it was founded was not a final judgment.

That judgment, as will be seen from the record, was rendered by the Court of Chancery in August, 1891, in pursuance of a mandate from the Supreme Court. An appeal from it to the Supreme Court was taken and allowed before the writ of error was granted. After a second hearing in the Supreme Court, the case was again remanded

to the Court of Chancery, and a final decree was made in August, 1894. From this decree, the second writ of error (No. 830), was brought. The assignment of error is the same under both writs. (*Record in No.* 299, *pp.* 31–32–33–34–46; *Record in No.* 830, *pp.* 30–31–32–43–44.)

It is obvious that the first writ of error was premature, and such seems to have been the view of the learned counsel for the plaintiff in error when they advised the second.

But it is unnecessary to discuss that point. It is only material now, so far as the costs of one writ of error are concerned. One or the other must be dismissed, since there cannot be two final judgments in the same case, nor two writs of error founded upon the same assignment of error in the judgment sought to be reviewed.

VI.

Upon the whole case, both writs of error should be dismissed, as presenting no Federal question. Or one writ of error (undoubtedly the first) should be dismissed, and the judgment of the State Court upon the other, affirmed; and costs upon both writs should be allowed to the defendant in error.

Eustis v. *Bolles*, *supra*.

E. J. Phelps and
B. F. Fifield,
For the Defendant in Error.

APPENDIX.

[OPINION OF CHIEF JUSTICE ROSS IN THIS CASE.]

(63 Ver. Rep., 1.)

I concur in the views of the majority of the Court on the question of interest, but disagree, with reference to the construction to be placed upon Secs. 1, 11, 12, 13 and 14 of No. 1 of the Acts of 1882. These contain the entire provisions of the act relative to taxing railroads. In determining upon the proper construction to be given to these sections, all their provisions must be considered. If Sec. 11 stood alone I should say that the tax is imposed upon the entire gross earnings received by a corporation or person from the operation of a railroad within this State. Its language seems to demand such construction. The first part of the opinion of the majority of the Court assumes that this is the construction to be placed upon the act, and, therefore, holds the tax, so far as derived from interstate commerce, void. On this construction they justly hold that that part of the tax assessed upon the earnings derived from interstate commerce is unconstitutional and void, in accordance with the decision of the United States Supreme Court in Steamship Co. *v.* Pennsylvania, 122 U. S., 326. If a tax upon the entire gross earnings, it must rest upon the party to whom such earnings belong. In that case, under the lease by the orator to the defendant, I think the tax would clearly fall upon the defendant; and the payment of the tax by defendant would only pay its debt to the State, and would pay no part of the rent due from it to the orator. Under the lease, I think, the defendant alone

is entitled to and owns the entire gross earnings derived by it from operating the railroad of the orator. I do not think the reference in the lease to the gross earnings for the purpose of fixing the amount of the rent makes any part of the gross earnings, as such, the property of the orator. Such earnings were not made the property of the orator, nor was the defendant under obligation to turn such earnings over to the orator in payment of the rent due it. The rent was to be paid in part by the order on the Cheshire Railroad Company. What was not thus paid the defendant could pay out of any funds which it could control. The orator, I think, had no gross earnings. Its income derived from the rent fixed by the lease was not gross earnings within the contemplation of the statute. While it owned the road, roadbed and rolling stock it did not operate them. Hence, if this section were the whole of the law applicable to the taxation of this class of property, I should hold that the tax, whether valid or invalid, rested upon the defendant's property, and such payment gave the defendant no relief from paying the full amount of the rent stipulated in the lease.

But this section does not contain the whole law relating to this subject. Sections 12 and 13 of the act need not be considered. They relate to the mode of ascertaining the amount of the tax per mile of the road operated in this State, and to the times when the tax is required to be paid.

In ascertaining the intention of the Legislature, Section 14 of the act must be considered. That section provides that, when a railroad is operated under a lease or contract, by some party other than its owner, the tax shall be paid by such other party but for the owner of the railroad. It proceeds upon the basis that the tax, in all cases, is upon the property of the railroad, and to be paid by its owner. When, therefore, the railroad and rolling stock of a company are operated by a lessee, or contractee, for his own benefit, and when the gross earnings de-

rived from operating the property belong, by the terms of the lease, or contract, to the operator, the tax rests, not upon the gross earnings, *in specie*, but upon the railroad, rolling stock and right to operate them, valued upon the basis of the gross earnings per mile derived therefrom. By both Sections 11 and 14 the tax is made to rest upon property. I do not think that the act should be so construed as to make the tax rest upon the property of the lessor or contractor, the railroad, rolling stock and right to operate them, when operated under a lease or contract, and upon the gross earnings derived therefrom when operated by the owner. The act should be so construed that the tax will rest uniformly upon all such property by whomsoever operated. This result can be reached only by construing the act as I have done.

Turning now to Section 1 of the act, we find the same idea expressed. The tax there is denominated a tax upon the corporate franchise or business in this State of a railroad. The most valuable franchise, and pretty much the only ones of pecuniary value, are the rights conferred by the State on such corporations, to locate, build, maintain, own and operate a railroad with its rolling stock in this State. Every railroad in the State holds these franchises from the State. Here it is declared that the tax is upon the franchise. When "or business in this State" is added, it suggests that the franchise is to be valued upon the basis of the earnings received from the operation of the property. On this construction, Section 11 of the act declares that the value of the railroad, rolling stock, and right to operate them, in this State, is, for the purpose of taxation, to be determined by the gross earnings derived from such operation thereof per mile, within this State. Section 12 rates the tax upon the property or franchise so valued, and Section 13 declares when the tax shall be paid. This construction makes all the provisions of the

act on this subject harmonious, renders the tax a tax upon the property or franchise to be paid by the owner of the property or franchise, and avoids all constitutional objections. I do not find anything in *Steamship Co.* v. *Pennsylvania, supra*, nor in any of the decisions there referred to and commented upon, which militates against this construction of this act. In the State Freight Tax case, 15 Wall, 232 to 282 (L. C., 21, 160), Justice Strong says: "Before proceeding, however, to a consideration of the direct question whether the statute is in direct conflict with any provision of the Constitution of the United States, it is necessary to have a clear apprehension of the subject and nature of the tax imposed by it. It has repeatedly been held that the constitutionality or the unconstitutionality of a State tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. This was decided in the cases of Bank of Commerce *v.* New York, 2 Black., 620; in the Bank Tax case, 2 Wall., 200; Society for Savings *v.* Coite, 6 Wall., 594. and Providence I. Institution *v.* Mass., 611. In all these cases it appeared that the bank was required by the statute to pay the tax, but the decision turned upon the questions: What was the subject of the tax? Upon what did the burden really rest? not upon the question from whom the State exacted payment into its treasury. Hence, where it appeared that the ultimate burden rested upon the property of the bank invested in United States securities, it was held unconstitutional, but where it rested upon the franchise of the bank, it was sustained." I understand the principle thus announced is unquestioned. My associates make this a tax upon the gross earnings in the first part of the opinion, and then by some process of reasoning, of which I fail to see the force or conclusiveness, hold that it is a tax upon the orator, analogous to the tax imposed upon the orator's roadbed per mile, under the acts of 1874 and 1876, and decided by this Court in Rutland

County, but unreported, and which method of taxation this took the place of. They also hold, as I understand the opinion, that the gross earnings derived from the operation of the orator's railroad and property by the defendant belonged to the defendant, and yet that the tax rests upon the orator. I am unable to understand in what way that result can come about, unless the tax rests upon the orator's roadbed, rolling stock and right to operate them, valued upon the basis of the gross earnings derived per mile from its operation in this State by the defendants. When the tax is made to rest upon the orator, who has no gross earnings, within the meaning of the act, it falls within the principle announced and quoted from the opinion of Justice Strong in the State Freight Tax case, and is not unconstitutional. The burden of the tax, on the views of my associates, rests upon the orator. As the orator derives no gross earnings from its railroad, the tax, it seems to me, must either rest upon the railroad property or franchises of the orator. It must rest upon what the orator has and enjoys, and not upon what it does not own and is not entitled to. While I agree in the result reached by the majority of the Court, I dissent from the method of reaching it and from holding the act unconstitutional.